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Vol. 2 (of 2 Volumes)

Environmental Compliance Guide

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U.S. Department of Energy
Assistant Secretary for Environmental
Protection, Safety, and Emergency Preparedness
Office of Environmental Compliance and Overview
NEPA Affairs Division
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PREFACE

Volume II is designed to supplement Volume I of the Guide and contains copies of the authorities used to develop the Part III flowcharts. Collectively, Volumes I and II provide necessary step-by-step procedures, relative timing, and details to assist in achieving compliance with federal environmental requirements.

Time and experience will dictate changes in the Guide. Regulation changes will require replacement of segments of Volume II and possibly modification to the flow charts in Volume I. Experience in the use of the Guide will indicate additions and changes that should be made and these will be issued when required. Usage will also suggest additional personal changes and/or additions that can help in achieving timely implementation of energy programs and improved resource utilization with reduced environmental degradation.

Regulations relating to the consultative or permit requirements of the following have been included in Volume II.

- Clean Air Act, as amended (P.L. 90-148, P.L. 91-604, P.L. 92-157, P.L. 93-15, P.L. 93-319, P.L. 95-95, P.L. 95-190)
- Clean Water Act, as amended (P.L. 92-500, P.L. 93-207, P.L. 93-243, P.L. 93-592, P.L. 94-238, P.L. 94-558, P.L. 95-217, P.L. 95-576)
- Coastal Zone Management Act, as amended (P.L. 92-583, P.L. 94-370, P.L. 95-372)
- Endangered Species Act, as amended (P.L. 93-205, P.L. 94-325, P.L. 94-359, P.L. 95-212, P.L. 95-632, P.L. 96-159)
- Fish and Wildlife Coordination, as amended (P.L. 88-624, P.L. 89-72)
- Wild and Scenic Rivers, as amended (P.L. 90-542, P.L. 92-560, P.L. 93-279, P.L. 93-621, P.L. 94-199, P.L. 94-273, P.L. 94-486, P.L. 95-625)
- Historic Preservation Act (P.L. 89-665)
- Non-Nuclear Research and Development Act, as amended (P.L. 93-577, P.L. 95-39)
- Resource Conservation and Recovery Act (Subsection C), as amended (P.L. 89-272, P.L. 91-512, P.L. 93-14, P.L. 93-611, P.L. 94-580, P.L. 95-609)

- Safe Drinking Water Act (Underground Injection) (P.L. 93-523, P.L. 95-190, P.L. 96-63)

DOE Floodplain/Wetland Guidelines for compliance with E.O. 11988 and E.O. 11990, and regulations implementing both the Corps of Engineers' and the Environmental Protection Agency's respective consolidated permit programs have also been included.

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code of federal regulations

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Revised as of July 1, 1980

the date of such measurements or maintenance.

(4) Such procedures shall require the source owner or operator to submit information relating to emissions and operation of the emission monitors to the State to the extent described in Appendix P as frequently or more frequently as described therein.

(5) Such procedures shall provide that sources subject to the requirements of § 51.19(e)(2) shall have installed all necessary equipment and shall have begun monitoring and recording within 18 months of (i) the approval of a State plan requiring monitoring for that source or (ii) promulgation by the Agency of monitoring requirements for that source. However, sources that have made good faith efforts to purchase, install, and begin the monitoring and recording of emission data but who have been unable to complete such installation within the time period provided may be given reasonable extensions of time as deemed appropriate by the State.

(6) States shall submit revisions to the applicable plan which implement the provisions of this section by October 6, 1976.

[36 FR 22398, Nov. 25, 1971, as amended at 38 FR 15196, June 8, 1973; 40 FR 46247, Oct. 6, 1975]

§ 51.20 Resources.

Each plan shall include a description of the resources available to the State and local agencies at the date of submission of the plan and of any additional resources needed to carry out the plan during the 5-year period following its submission. Such description, which shall be provided in a form similar to that in Appendix K to this part, shall include projections of the extent to which resources will be acquired at 1-, 3-, and 5-year intervals.

§ 51.21 [Reserved]

§ 51.22 Rules and regulations.

Emission limitations and other measures necessary for attainment and maintenance of any national standard, including any measures necessary to implement the requirements of § 51.11, shall be adopted as rules and regulations enforceable by the State agency. Copies of all such rules and regulations shall be submitted with the plan. Except as otherwise provided by § 51.11(b), submittal of a plan setting forth proposed rules and regulations will not satisfy the requirements of this section nor will it be considered a timely submittal.

§ 51.23 Exceptions.

To the extent that Subpart D conflicts with the requirements of Subparts A or B with respect to plan revisions that the Administrator requires to be submitted in accordance with Subpart D, Subpart D shall govern.

[41 FR 18388, May 3, 1976]

§ 51.24 Prevention of significant deterioration of air quality.

(a) (1) *Plan requirements.* In accordance with the policy of section 101(b)(1) of the act and the purposes of section 160 of the Act, each applicable State implementation plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) *Plan revisions.* If a State implementation plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment.

(3) *Required plan revision.* If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) *Plan assessment.* The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) *Public participation.* Any State action taken under this paragraph shall be subject to the opportunity for

public hearing in accordance with procedures equivalent to those established in § 51.4.

(b) *Definitions.* For the purposes of this section:

(1) "Major stationary source" means:

(i) Any of the following stationary sources of air pollutants which emit, or have the potential to emit, 100 tons per year or more of any air pollutant regulated under the Clean Air Act (the "Act"): Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants; and

(ii) Notwithstanding the source sizes specified in paragraph (b)(1)(i) of this section, any source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant regulated under the Act.

(2) "Major modification" means any physical change in, change in the method of operation of, or addition to a stationary source which increases the potential emission rate of any air pollutant regulated under the Act (including any not previously emitted and taking into account all accumulated increases in potential emissions occurring at the source since regulations were approved under this section, or since the time of the last construction approval issued for the source pursuant to such regulations approved under this section, whichever time is more recent, regardless of any emission reductions achieved elsewhere in the source) by either 100 tons per year or more for any source category identified in paragraph (b)(1)(i) of this section, or by 250 tons per year or more for any stationary source.

(i) A physical change shall not include routine maintenance, repair and replacement.

(ii) A change in the method of operation, unless previously limited by enforceable permit conditions, shall not include:

(*a*) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(*b*) An increase in the hours of operation;

(*c*) Use of an alternative fuel or raw material by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), or by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act;

(*d*) Use of an alternative fuel or raw material, if prior to January 6, 1975, the source was capable of accommodating such fuel or material; or

(*e*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act.

(*f*) Change in ownership of the source.

(3) "Potential to emit" means the capability at maximum capacity to emit a pollutant in the absence of air pollution control equipment. "Air pollution control equipment" includes control equipment which is not, aside from air pollution control laws and regulations, vital to production of the normal product of the source or to its normal operation. Annual potential shall be based on the maximum annual rated capacity of the source, unless the source is subject to enforceable permit conditions which limit the annual hours of operation. Enforceable permit conditions on the type or amount of materials combusted or processed may be used in determining the potential emission rate of a source.

(4) "Source" means any structure, building, facility, equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).

(5) "Facility" means an identifiable piece of process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

(6) "Fugitive dust" means particulate matter composed of soil which is uncontaminated by pollutants resulting from industrial activity. Fugitive dust may include emissions from haul roads, wind erosion of exposed soil surfaces and soil storage piles, and other activities in which soil is either removed, stored, transported, or redistributed.

(7) "Construction" means fabrication, erection, installation, or modification of a source.

(8) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals and either has:

(i) Begun, or caused to begin, a continuous program of physical on-site construction of the source to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of construction of the source to be completed within a reasonable time.

(9) "Necessary preconstruction approvals or permits" means those permits or approvals required under Federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State implementation plan.

(10) "Best available control technology" means an emission limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under the act which would be emitted from any proposed major stationary source or major modification which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of the best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Part 60 and Part 61. If the reviewing agency determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, it may instead prescribe a design, equipment, work practice or operational standard, or combination thereof, to require the application of best available control technology. Such standard shall, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice or operation and shall provide for compliance by means which achieve equivalent results.

(11) "Baseline concentration" means that ambient concentration level reflecting actual air quality as of August 7, 1977, minus any contribution from major stationary sources and major modifications on which construction commenced on or after January 6, 1975. The baseline concentration shall include contributions from:

(i) The actual emissions of other sources in existence on August 7, 1977, except that contributions from facilities within such existing sources for which a plan revision proposing less restrictive requirements was submitted on or before August 7, 1977, and was pending action by the Administrator on that date shall be determined from the allowable emissions of such facilities under the plan as revised; and

(ii) The allowable emissions of major stationary sources and major modifications which commenced construction before January 6, 1975, but were not in operation by August 7, 1977.

(12) "Federal Land Manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(13) "High terrain" means any area having an elevation of 900 feet or more above the base of the stack of a facility.

(14) "Low terrain" means any area other than high terrain.

(15) "Indian Reservation" means any federally-recognized reservation established by treaty, agreement, Executive order, or act of Congress.

(16) "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(17) "Allowable emissions" means the emission rate calculated using the maximum rated capacity of the source (unless the source is subject to enforceable permit conditions which limit the operating rate or hours of operation, or both) and the most stringent of the following:

(i) Applicable standards as set forth in 40 CFR Part 60 and Part 61,

(ii) The applicable State implementation plan emission limitation, or

(iii) The emission rate specified as a permit condition.

(18) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceed 50 percent of the fixed capital cost of a comparable entirely new facility or source. However, any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed source will be treated as a new source for purposes of this section, except that use of an alternative fuel or raw material by reason of an order in effect under Sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act, or by reason of an order or rule under Section 125 of the Act, shall not be considered reconstruction. In determining best available control technology for a reconstructed source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a standard of performance under 40 CFR Part 60 is applicable to such source.

(19) "Fixed capital cost" means the capital needed to provide all the depreciable components.

(c) *Ambient air increments.* The plan shall contain emission limitations and such other measures as may be necessary to assure that in areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Pollutant	*Maximum allowable increase (micrograms per cubic meter)*
CLASS I	
Particulate matter:	
Annual geometric mean	5
24-hr maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
CLASS II	
Particulate matter:	
Annual geometric mean	19
24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
CLASS III	
Particulate matter:	
Annual geometric mean	37
24-hr maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

(d) *Ambient air ceilings.* The plan shall provide that no concentration of a pollutant shall exceed:

(1) The concentration permitted under the national secondary ambient air quality standard, or

(2) The concentration permitted under the national primary ambient air quality standard, whichever con-

centration is lowest for the pollutant for a period of exposure.

(e) *Restrictions on area classifications.* The plan shall provide that—

(1) All of the following areas which were in existence on August 7, 1977, shall be Class I areas and may not be redesignated:

(i) International parks,

(ii) National wilderness areas which exceed 5,000 acres in size,

(iii) National memorial parks which exceed 5,000 acres in size, and

(iv) National parks which exceed 6,000 acres in size.

(2) Areas which were redesignated as Class I under regulations promulgated before August 7, 1977, shall remain Class I, but may be redesignated as provided in this section.

(3) Any other area, unless otherwise specified in the legislation creating such an area, is initially designated Class II, but may be redesignated as provided in this section.

(4) The following areas may be redesignated only as Class I or II:

(i) An area which as of August 7, 1977, exceeded 10,000 acres in size and was a national monument, a national primitive area, a national preserve, a national recreational area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore; and

(ii) A national park or national wilderness area established after August 7, 1977, which exceeds 10,000 acres in size.

(f) *Exclusions from increment consumption.* (1) The plan may provide that the following concentrations shall be excluded in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under Sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities; and

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration.

(2) If the plan provides that the concentrations to which paragraph (f)(1) of this section refers shall be excluded, it shall also provide that—

(i) No exclusion of such concentrations shall apply more than five years after the effective date of the order to which paragraph (f)(1)(i) of this section refers or the plan to which paragraph (f)(1)(ii) of this section refers, whichever is applicable.

(ii) If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(g) *Redesignation.* (1) The plan shall provide that all areas of the State (except as otherwise provided under paragraph (e) of this section) shall be designated either Class I, Class II, or Class III. Any designation other than Class II shall be subject to the redesignation procedures of this paragraph. Redesignation (except as otherwise precluded by paragraph (e) of this section) may be proposed by the respective States or Indian Governing Bodies, as provided below, subject to approval by the Administrator as a revision to the applicable State implementation plan.

(2) The plan may provide that the State may submit to the Administrator a proposal to redesignate areas of the State Class I or Class II: *Provided,* That:

(i) At least one public hearing has been held in accordance with procedures established in § 51.4.

(ii) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation were notified at least 30 days prior to the public hearing;

(iii) A discussion of the reasons for the proposed redesignation, including a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation, was prepared and made available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contained appropriate notification of the availability of such discussion;

(iv) Prior to the issuance of notice respecting the redesignation of an area that includes any Federal lands, the State has provided written notice to the appropriate Federal Land Manager and afforded adequate opportunity (not in excess of 60 days) to confer with the State respecting the redesignation and to submit written comments and recommendations. In redesignating any area with respect to which any Federal Land Manager had submitted written comments and recommendations, the State shall have published a list of any inconsistency between such redesignation and such comments and recommendations (together with the reasons for making such redesignation against the recommendation of the Federal Land Manager); and

(v) The State has proposed the redesignation after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

(3) The plan may provide that any area other than an area to which paragraph (e) of this section refers may be redesignated as Class III if—

(i) The redesignation would meet the requirements of provisions established in accordance with paragraph (g)(2) of this section;

(ii) The redesignation, except any established by an Indian Governing Body, has been specifically approved by the Governor of the State, after consultation with the appropriate committees of the legislature, if it is in session, or with the leadership of the legislature, if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area to be redesignated enact legislation (including resolutions where appropriate) concurring in the redesignation;

(iii) The redesignation would not cause, or contribute to, a concentration of any air pollutant which would exceed any maximum allowable increase permitted under the classification of any other area or any national ambient air quality standard; and

(iv) Any permit application for any major stationary source or major modification subject to provisions established in accordance with paragraph (l) of this section which could receive a permit only if the area in question were redesignated as Class III, and any material submitted as part of that application, were available, insofar as was practicable, for public inspection prior to any public hearing on redesignation of any area as Class III.

(4) The plan shall provide that lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III: *Provided*, That:

(i) The Indian Governing Body has followed procedures equivalent to those required of a State under paragraphs (g)(2), (g)(3)(iii), and (g)(3)(iv) of this section; and

(ii) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located and which border the Indian Reservation.

(5) The Administrator shall disapprove, within 90 days of submission, a proposed redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with paragraph (e) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior

to the redesignation which was disapproved.

(6) If the Administrator disapproves any proposed area designation, the State or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator.

(h) *Stack heights.* The plan shall provide, as a minimum, that the degree of emission limitation required for control of any air pollutant under the plan shall not be affected in any manner by—

(1) So much of a stack height, not in existence before December 31, 1970, as exceeds good engineering practice, or

(2) Any other dispersion technique not implemented before then.

(i) *Review of major stationary sources and major modifications—Source applicability and general exemptions.* (1) The plan shall provide that no major stationary source or major modification shall be constructed unless, as a minimum, requirements equivalent to those contained in the subparagraphs of paragraphs (j), (l), (n), (p), and (r) of this section, have been met. The plan may provide that such requirements shall apply to a proposed source or modification only with respect to those pollutants for which the proposed construction would be a major stationary source or major modification.

(2) The plan may provide, as a minimum, that requirements equivalent to those contained in the subparagraphs of paragraphs (j), (l), (n), and (p) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that—

(i) As to that pollutant, the source or modification is subject to the emission offset ruling (41 FR 55524) as it may be amended or to regulations approved or promulgated pursuant to Section 173 of the Act, and

(ii) The source or modification would impact no area attaining the national ambient air quality standards (either internal or external to areas designated as nonattainment under Section 107 of the Act).

(3) The plan may provide that requirements equivalent to those contained in the subparagraphs of paragraphs (j), (l), (n), (p), and (r) of this section shall not apply to nonprofit health or education institutions.

(4) The plan may provide that a portable facility which has received construction approval under requirements equivalent to those contained in the subparagraphs of paragraphs (j), (l), (n), (p), (q), and (r) of this section may relocate without being subject to such requirements if—

(i) Emissions from the facility would not exceed allowable emissions; and

(ii) Such relocation would impact no Class I area and no area where an applicable increment is known to be violated; and

(iii) Notice is given to the reviewing authority at least 30 days prior to such relocation identifying the proposed new location and the probable duration of operation at such location.

(j) *Control technology review.* The plan shall provide that—

(1) A major stationary source or major modification shall meet all applicable emission limitations under the State implementation plan and all applicable emission standards and standards of performance under 40 CFR Part 60 and Part 61.

(2) A major stationary source or major modification shall apply best available control technology for each applicable pollutant, unless the increase in allowable emissions of that pollutant from the source would be less than 50 tons per year, 1,000 pounds per day, or 100 pounds per hour, whichever is most restrictive.

(i) The preceding hourly or daily rates shall apply only with respect to a pollutant for which an increment, or national ambient air quality standards, for a period less than 24 hours or a period of 24 hours, as appropriate, has been established.

(ii) In determining whether and to what extent a modification would increase allowable emissions, there shall be taken into account no emission reductions achieved elsewhere at the source at which the modification would occur.

(3) In the case of a modification, the requirement for best available control technology shall apply only to each new or modified facility which would

increase the allowable emissions of an applicable pollutant.

(4) Where a facility within a source would be modified but not reconstructed, the requirement for best available control technology, notwithstanding paragraph (j)(2) of this section, shall not apply if no net increase in emissions of an applicable pollutant would occur at the source, taking into account all emission increases and decreases at the source which would accompany the modification, and no adverse air quality impact would occur.

(5) For phased construction projects the determination of best available control technology shall be reviewed, and modified as appropriate, at the latest reasonable time prior to commencement of construction of each independent phase of the proposed source or modification.

(6) In the case of a major stationary source or major modification which the owner or operator proposes to construct in a Class III area, emissions from which would cause or contribute to air quality exceeding the maximum allowable increase that would be applicable if the area were a Class II area and where no standard under 40 CFR Part 60 has been promulgated for the source category, the Administrator shall approve the determination of best available control technology.

(k) *Exemptions from impact analysis.* (1) The plan may provide that with respect to a particular pollutant the requirements of provisions established in accordance with paragraphs (l), (n), and (p) of this section shall not apply to a proposed major stationary source or major modification, if—

(i) The increase in allowable emissions of that pollutant from the source or modification would impact no Class I area and no area where an applicable increment is known to be violated; and

(ii) The increase in allowable emissions of that pollutant from the source or modification would be less than 50 tons per year, 1,000 pounds per day, or 100 pounds per hour, whichever is most restrictive; or

(iii) The emissions of the pollutant are of a temporary nature including but not limited to those from a pilot plant, a portable facility, construction, or exploration; or

(iv) A source is modified, but no increase in the net amount of emissions for any pollutant subject to a national ambient air quality standard and no adverse air quality impact would occur.

(2) The hourly or daily rates set in paragraph (k)(1)(ii) of this section shall apply only with respect to a pollutant for which an increment, or national ambient air quality standard, for a period of less than 24 hours or for a period of 24 hours, as appropriate, has been established.

(3) The plan shall provide that, in determining for the purpose of provisions established in accordance with paragraph (k)(1)(ii) of this section whether and to what extent a modification would increase allowable emissions, there shall be taken into account no emission reductions achieved elsewhere at the source at which the modification would occur.

(4) The plan shall provide that, in determining for the purpose of provisions established in accordance with paragraph (k)(1)(iv) of this section whether and to what extent there would be an increase in the net amount of emissions of any pollutant subject to a national ambient air quality standard from the source which is modified, there shall be taken into account all emission increases and decreases occurring at the source since August 7, 1977.

(5) The plan may provide that the requirements of provisions established in accordance with paragraphs (l), (n), and (p) of this section shall not apply to a major stationary source or major modification with respect to emissions from it which the owner or operator has shown to be fugitive dust.

(l) *Air quality review.* (1) The plan shall provide that the owner or operator of the proposed source or modification must demonstrate that allowable emissions increases from the source or modification, in conjunction with all other applicable emissions increases or reductions, will not cause or contribute to air pollution in violation of—

(i) Any national ambient air quality standard in any air quality control region; or

(ii) Any applicable maximum allowable increase over the baseline concentration in any area.

(m) *Air quality models.* (1) The plan shall provide for procedures which specify that—

(i) All estimates of ambient concentrations required under paragraph (l) shall be based on the applicable air quality models, data bases, and other requirements specified in the *Guideline on Air Quality Models*[1] (OAQPS 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, April 1978).

(ii) Where an air quality impact model specified in the *Guideline on Air Quality Models*[1] is inappropriate, the model may be modified or another model substituted.

(iii) A substitution or modification of a model shall be subject to public comment procedures developed in accordance with paragraph (r) of this section.

(iv) Written approval of the Administrator must be obtained for any modification or substitution.

(v) Methods like those outlined in the *Workbook for the Comparison of Air Quality Models* (U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, April 1977) should be used to determine the comparability of air quality models.

(2) The *Guideline on Air Quality Models*[1] is incorporated by reference. On April 27, 1978, the Office of the FEDERAL REGISTER approved this document for incorporation by reference. A copy of the guideline is on file in the FEDERAL REGISTER library.

(3) The documents referenced in this paragraph are available for public inspection at EPA's Public Information Reference Unit, Room 2922, 401 M Street SW., Washington, D.C. 20460, and at the libraries of each of the ten EPA Regional Offices. Copies are available as supplies permit from the Library Service Office (MD-35), U.S. Environmental Protection Agency, Research Triangle Park, N.C. 27711. Also, copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, Va. 22161.

(n) *Monitoring.* The plan shall provide that—

(1) The owner or operator of a proposed source or modification shall, after construction of the source or modification, conduct such ambient air quality monitoring as the reviewing authority determines may be necessary to establish the effect which emissions from the source or modification of a pollutant for which a national ambient air quality standard exists (other than non-methane hydrocarbons) may have, or is having, on air quality in any area which such emissions would affect.

(2) As necessary to determine whether emissions from the proposed source or modification would cause or contribute to a violation of a national ambient air quality standard, any permit application submitted after August 7, 1978, shall include an analysis of continuous air quality monitoring data for any pollutant emitted by the source or modification for which a national ambient air quality standard exists, except non-methane hydrocarbons. Such data shall relate to, and shall have been gathered over, the year preceding receipt of the complete application, unless the owner or operator demonstrates to the State's satisfaction that such data gathered over a portion or portions of that year or another representative year would be adequate to determine that the source or modification would not cause or contribute to a violation of a national ambient air quality standard.

(3) The owner or operator shall meet the requirements of Appendix B to Part 58 of this chapter during the operation of monitoring stations required by paragraph (n)(1) of this section as follows:

(i) No later than January 1, 1980, for existing stations, or

(ii) For new stations, at the time the station is put into operation.

(o) *Source information.* (1) The plan shall provide that the owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under procedures established in accordance with this section.

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[1] Incorporation by reference approved by Director, Office of the FEDERAL REGISTER on April 27, 1978.

(2) The plan may provide that such information shall include:

(i) A description of the nature, location, design capacity, and typical operating schedule of the source or modification, including specifications and drawings showing its design and plant layout;

(ii) A detailed schedule for construction of the source or modification;

(iii) A detailed description as to what system of continuous emission reduction is planned by the source or modification, emission estimates, and any other information as necessary to determine that best available control technology as applicable would be applied;

(3) The plan shall provide that upon request of the State, the owner or operator shall also provide information on:

(i) The air quality impact of the source or modification, including meteorological and topographical data necessary to estimate such impact; and

(ii) The air quality impacts and the nature and extent of any or all general commercial, residential, industrial, and other growth which has occurred since August 7, 1977, in the area the source or modification would affect.

(p) *Additional impact analyses.* The plan shall provide that—

(1) The owner or operator shall provide an analysis of the impairment to visibility, soils, and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial, and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

(2) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial, and other growth associated with the source or modification.

(q) *Sources impacting Federal Class I areas—additional requirements—*

(1) *Notice to EPA.* The plan shall provide that the reviewing authority shall transmit to the Administrator a copy of each permit application relating to a major stationary source or major modification and provide notice to the Administrator of every action related to the consideration of such permit.

(2) *Federal Land Manager.* The Federal Land Manager and the Federal official charged with direct responsibility for management of Class I lands have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands and to consider, in consultation with the Administrator, whether a proposed source or modification would have an adverse impact on such values.

(3) *Denial—impact on air quality related values.* The plan shall provide a mechanism whereby a Federal Land Manager of any such lands may present to the State, after the reviewing authority's preliminary determination required under procedures developed in accordance with paragraph (r) of this section, a demonstration that the emissions from the proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of any Federal mandatory Class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the State concurs with such demonstration, the reviewing authority shall not issue the permit.

(4) *Class I Variances.* The plan may provide that the owner or operator of a proposed source or modification may demonstrate to the Federal Land Manager that the emissions from such source would have no adverse impact on the air quality related values of such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Federal Land Manager concurs with such demonstration and so certifies to the State, the reviewing authority may: *Provided,* That applicable re-

quirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide and particulate matter would not exceed the following maximum allowable increases over baseline concentration for such pollutants:

	Maximum allowable increase (micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
24-hr. maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr. maximum	91
3-hr. maximum	325

(5) *Sulfur Dioxide Variance by Governor with Federal Land Manager's Concurrence.* The plan may provide that—

(i) The owner or operator of a proposed source or modification which cannot be approved under procedures developed pursuant to paragraph (q)(4) of this section may demonstrate to the Governor that the source or modification cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any Class I area and, in the case of Federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality related values of the area (including visibility);

(ii) The Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant, after notice and an opportunity for a public hearing, a variance from such maximum allowable increase; and

(iii) If such variance is granted, the reviewing authority may issue a permit to such source or modification in accordance with provisions developed pursuant to paragraph (q)(7) of this section: *Provided,* That the applicable requirements of the plan are otherwise met.

(6) *Variance by the Governor with the President's concurrence.* The plan may provide that—

(i) The recommendations of the Governor and the Federal Land Manager shall be transferred to the President in any case where the Governor recommends a variance in which the Federal Land Manager does not concur;

(ii) The President may approve the Governor's recommendation if he finds that such variance is in the national interest; and

(iii) If such a variance is approved, the reviewing authority may issue a permit in accordance with provisions developed pursuant to the requirements of paragraph (q)(7) of this section: *Provided,* That the applicable requirements of the plan are otherwise met.

(7) *Emission Limitations for Presidential or Gubernatorial Variance.* The plan shall provide that in the case of a permit issued under procedures developed pursuant to paragraph (q)(5) or (6) of this section, the source or modification shall comply with emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

Maximum Allowable Increase

[Micrograms per cubic meter]

Period of exposure	Terrain areas	
	Low	High
24-hr maximum	36	62
3-hr maximum	130	221

(r) *Public participation.* The plan shall provide that—

(1) The reviewing authority shall notify all applicants within a specified time period as to the completeness of the application or any deficiency in the application or information submitted. In the event of such a deficiency,

the date of receipt of the application shall be the date on which the reviewing authority received all required information.

(2) Within one year after receipt of a complete application, the reviewing authority shall:

(i) Make a preliminary determination whether construction should be approved, approved with conditions, or disapproved.

(ii) Make available in at least one location in each region in which the proposed source would be constructed a copy of all materials the applicant submitted, a copy of the preliminary determination, and a copy or summary of other materials, if any, considered in making the preliminary determination.

(iii) Notify the public, by advertisement in a newspaper of general circulation in each region in which the proposed source would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and of the opportunity for comment at a public hearing as well as written public comment.

(iv) Send a copy of the notice of public comment to the applicant, the Administrator and to officials and agencies having cognizance over the location where the proposed construction would occur as follows: any other State or local air pollution control agencies, the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency, and any State, Federal Land Manager, or Indian Governing body whose lands may be affected by emissions from the source or modification.

(v) Provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the source, alternatives to it, the control technology required, and other appropriate considerations.

(vi) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing(s) in making a final decision on the approvability of the application. The reviewing authority shall make all comments available for public inspection in the same locations where the reviewing authority made available preconstruction information relating to the proposed source or modification.

(vii) Make a final determination whether construction should be approved, approved with conditions, or disapproved.

(viii) Notify the applicant in writing of the final determination and make such notification available for public inspection at the same location where the reviewing authority made available preconstruction information and public comments relating to the source.

(s) *Source obligation.* The plan shall include legally enforceable procedures to provide that approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, State or Federal law.

(Secs. 110, 301(a), 313, 319, Clean Air Act (42 U.S.C. 7410, 7601(a), 7613, 7619))

[43 FR 26382, June 19, 1978; 43 FR 40010, Sept. 8, 1978, as amended at 44 FR 27569, May 10, 1979]

EFFECTIVE DATE NOTE: Regulations in § 51.24 were stayed in part, until further notice, by order published at 45 FR 7801, Feb. 5, 1980.

Subpart C—Extensions

§ 51.30 Request for 2-year extension.

(a) The Governor of a State may, at the time of submission of a plan to implement a primary standard in a Priority I region, request the Administrator to extend, for a period not exceeding 2 years, the 3-year period prescribed by the Act for attainment of the primary standard in such region.

(b) Any such request regarding an interstate region shall be submitted jointly with the requests of Governors of all States in the region, or shall show that the Governor of each State in the region has been notified of such a request.

(c) Any such request regarding attainment of a primary standard shall be submitted together with a plan which shall:

APPENDIX R.—*Agency functions for air quality maintenance area plans for the————AQMA in the State of ———— for the year ————*

Control measures	Agencies [1]	State air pollution control agencies	Local air pollution control agencies	Implementation plan review agencies (A-95, 3-C)	Planning agencies	Transportation agencies	Other (water control, public works, etc.)
FUND ESTIMATES BY FUNCTION							
Measure a							
Measure b							
Measure m							
Total funds [2]							
MAN-YEAR ESTIMATES BY FUNCTION							
Measure a							
Measure b							
Measure m							
Total							

[1] Specific agencies should be identified in a narrative attachment.

[2] Report funds in thousands of dollars.

[41 FR 18391, May 3, 1976]

APPENDIX S—EMISSION OFFSET INTERPRETATIVE RULING

I. INTRODUCTION

This appendix sets forth EPA's Interpretative Ruling on the preconstruction review requirements for stationary sources of air pollution (not including indirect sources) under 40 CFR 51.18 and Section 129 of the Clean Air Act Amendments of 1977, Pub. L. 95-95, (note under 42 U.S.C. 7502). A major new source or major modification which would locate in an area designated in 40 CFR 81.300 *et. seq.* as nonattainment for a pollutant for which the source or modification would be major may be allowed to construct only if the stringent conditions set forth below are met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that there will be progress toward achievement of the NAAQS.

For each area designated as exceeding an NAAQS (nonattainment area) under 40 CFR 81.300 *et seq.*, this Interpretative Ruling will be superseded after June 30, 1979—(a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of Part D, Title 1, of the Act; or (b) by a prohibition on construction under the applicable SIP and Section 110(a)(2)(I) of the Act, if the SIP does not meet the requirements of Part D. The Ruling will remain in effect to the extent not superseded under the Act. This prohibition on major new source construction does not apply to a source whose permit to construct was applied for during a period when the SIP was in compliance with Part D, or before the deadline for having a revised SIP in effect that satisfies Part D.

II. INITIAL SCREENING ANAYLSES AND DETERMINATION OF APPLICABLE REQUIREMENTS

A. *Definitions.* For purposes of this Ruling:

1. "Source" means any structure, building, facility, equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).

2. "Facility" means an identifiable piece or process equipment. A stationary source is composed of one or more pollutant-emitting facilities.

3. "Potential" to emit means the maximum capacity to emit a pollutant absent air pollution control equipment. "Air pollution control equipment" includes control equip-

ment which is not, aside from air pollution control laws and regulations, vital to production of the normal product of the source or to its normal operation. Annual potential shall be based on the maximum annual rated capacity of the source, unless the source is subject to enforceable permit conditions which limit the operating rate or hours of operation, or both. Enforceable permit conditions on the type or amount of materials combusted or processed may be used in determining the potential emission rate of a source.

4. "Major source" means any source for which the potential emission rate is equal to or greater than 100 tons per year of any of the following pollutants: particulate matter, sulfur oxides, nitrogen oxides, volatile organic compounds, or carbon monoxide.

5. "Major modification" means any physical change in, change in the method of operation of, or addition to a stationary source which increases the potential emission rate of any air pollutant specified in section A.4. of this appendix (including any not previously emitted and taking into account all accumulated increases in potential emissions occurring at the source since February 16, 1979, or since the time of the last construction approval issued for the source pursuant to this Ruling, whichever time is more recent, and regardless of any emission reductions achieved eleswhere in the source) by 100 tons per year or more.

(i) A physical change shall not include routine maintenance, repair, and replacement.

(ii) A change in the method of operation, unless previously limited by enforceable permit conditions, shall not include:

(a) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(b) An increase in the hours of operation;

(c) Use of an alternative fuel or raw material, if on December 21, 1976, the source was capable of accommodating such fuel or material;

(d) Use of an alternative fuel or raw material by reason of an order in effect under Sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), or by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act;

(e) Use of an alternative fuel by reason of an order or rule under Section 125 of the Act;

(f) Change in ownership of a source; or

(g) Use of refuse derived fuel generated from municipal solid waste.

6. "Allowable emissions" means the emission rate calculated using the maximum rated capacity of the source (unless the source is subject to enforceable permit conditions which limit operating rate, or hours of operation, or both) and the most stringent of the following:

(i) Applicable new source performance standards or standards for hazardous pollutants set forth in 40 CFR Part 60 or Part 61;

(ii) Applicable SIP emission limitation; or

(iii) The emission rate specified as an enforceable permit condition.

7. "Lowest achievable emission rate" means, for any source, that rate of emissions based on the following, whichever is more stringent:

(i) The most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable; or

(ii) The most stringent emission limitation which is achieved in practice by such class or category of source.

This term, applied to a modification, means the lowest achievable emission rate for the new or modified facilities within the source. In no event shall the application of this term permit a proposed new or modified facility to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

8. "Fugitive dust" means particulate emissions composed of soil which is uncontaminated by pollutants resulting from industrial activity. Fugitive dust may include emissions from haul roads, wind erosion of exposed soil surfaces and soil storage piles and other activities in which soil is either removed, stored, transported, or redistributed.

9. "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceed 50 percent of the fixed capital cost of a comparable entirely new facility. However, any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed facility will be treated as a new facility for purposes of this Ruling, except that use of an alternative fuel or raw material by reason of an order in effect under Sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act, or by reason of an order or rule under Section 125 of the Act, shall not be considered reconstruction.

In determining LAER for a reconstructed source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such source.

10. "Fixed capital cost" means the capital needed to provide all the depreciable components.

11. "Secondary emissions" means emissions from new or existing sources which occur as

a result of the construction and/or operation of a major source or major modification, but do not come from the source itself. For purposes of this Ruling, secondary emissions must be specific and well defined, must be quantifiable, and must impact the same general nonattainment area as the major source which causes the secondary emission. Secondary emissions may include, but are not limited to:

a. Emissions from ships or trains coming to or from a refinery, terminal facility, etc.

b. Emissions from off-site support facilities which would be constructed or would otherwise increase emissions as a result of the construction of a major source.

12. "Resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. Energy conversion facilities must utilize solid waste to provide more than 50% of the heat input to be considered a resource recovery facility under this Ruling.

B. *Review of all sources for emission limitation compliance.* The reviewing authority must examine each proposed major new source and proposed major modification [1] to determine if such a source will meet all applicable emission requirements in the SIP, any applicable new source performance standard in 40 CFR Part 60, or any national emission standard for hazardous air pollutants in 40 CFR Part 61. If the reviewing authority determines that the proposed major new source cannot meet the applicable emission requirements, the permit to construct must be denied.

C. *Review of specified sources for air quality impact.* In addition, the reviewing authority must determine whether the major stationary source or major modification would be constructed in an area designated in 40 CFR 81.300-81.356 as nonattainment for a pollutant for which the stationary source or modification is major. However, a proposed source with allowable emissions which do not exceed 50 tons per year, 1000 pounds per day, or 100 pounds per hour, whichever is most restrictive,[2] needs no further analysis under this ruling, provided such a source meets the requirements of section II.B.

Where a source is constructed or modified in increments which individually do not emit more than the above amounts and the increments have not been offset in accordance with this Ruling, the allowable emissions from all such increments granted a permit to construct after December 21, 1976, shall be added together and this Ruling may be applicable to each increment when a proposed increment would cause the sum of the allowable emissions which have not been offset to equal or exceed 50 tons per year, 1000 pounds per day, or 100 pounds per hour. If any of the increments has not previously been subject to Condition 1 of Section IV.A. (requiring the source to meet the lowest achievable emission rate), such determination must consider the stage of construction of such increment and the ability of the source to install additional control equipment.

D.–E. [Reserved]

F. *Fugitive dust sources.*[3] Fugitive dust associated with major sources locating in clean portions of designated nonattainment areas or in designated attainment or unclassifiable areas shall be subject only to applicable requirements for preventing significant deterioration of air quality (see 40 CFR 52.21). Fugitive dust associated with major sources locating in an actual area of nonattainment shall be subject to Conditions 1, 2 and 3 of Section IV.A. of this Ruling.

G. *Secondary emissions.* Secondary emissions need not be considered in determining whether the emission rates in Section II.C. above would be exceeded. However, if a source is subject to this Ruling on the basis of the direct emissions from the source, the applicable conditions of this Ruling must also be met for secondary emissions. However, if the secondary emissions are not under the control of the applicant, such secondary emissions may be exempt from Conditions 1 and 2 of Section IV. Also, since EPA's authority to perform or require indirect source review relating to mobile sources regulated under Title II of the Act (motor vehicles and aircraft) has been restricted by statute, consideration of the indirect impacts of motor vehicles and aircraft traffic is not required under this Ruling.

III. Sources Locating in Designated Clean or Unclassifiable Areas Which Would Cause or Contribute to a Violation of a National Ambient Air Quality Standard.

A. This section applies only to major sources or major modifications which would locate in an area designated in 40 CFR 81.300 *et seq.* as attainment or unclassifiable in a state where EPA has not yet approved the state preconstruction review program required by 40 CFR 51.18(k), if the source or modification would exceed the following significance levels at any locality that does not meet the NAAQS:

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[1] Hereafter the term "source" will be used to denote both any source and any modification.

[2] Required only for those pollutants for which the increased allowable emissions exceed 50 tons per year, 1000 pounds per day, or 100 pounds per hour, although the reviewing authority may address other pollutants if deemed appropriate. The preceding hourly and daily rates shall apply only with respect to a pollutant for which a national ambient air quality standard, for a period less than 24 hours or for a 24-hour period, as appropriate, has been established.

[3] The discussion in this paragraph is a proposal, but represents EPA's interim policy until final rulemaking is completed.

	Annual	Averaging time (hours)			
		24	8	3	1
Pollutant:					
SO_2	1.0 µg/m^3	5 µg/m^3		25 µg/m^3	
TSP	1.0 µg/m^3	5 µg/m^3			
NO_2	1.0 µg/m^3				
CO			0.5 mg/m^3		2 mg/m^3.

B. Sources to which this section applies must meet Conditions 1, 2, and 4 of Section IV.A. of this ruling.[4] However, such sources may be exempt from Condition 3 of Section IV.A. of this ruling.

C. *Review of specified sources for air quality impact.* For "stable" air pollutants (i.e. SO_2, particulate matter and CO), the determination of whether a source will cause or contribute to a violation of an NAAQS generally should be made on a case-by-case basis as of the proposed new source's start-up date using the source's allowable emissions in an atmospheric simulation model (unless a source will clearly impact on a receptor which exceeds an NAAQS).

For sources of nitrogen oxides, the initial determination of whether a source would cause or contribute to a violation of the NAAQS for NO_2 should be made using an atmospheric simulation model assuming all the nitric oxide emitted is oxidized to NO_2 by the time the plume reaches ground level. the initial concentration estimates may be adjusted if adequate data are available to account for the expected oxidation rate.

For photochemical oxidants, sources of volatile organic compounds (VOC) locating within 36 hours travel time (under wind conditions associated with concentrations exceeding the NAAQS for oxidants) of a nonattainment monitor shall be subject to Section IV of this Ruling. However, a VOC source may be exempt from these requirements if the source owner can demonstrate that the emissions from the proposed source will have virtually no effect upon any area that exceeds the NAAQS for photochemical oxidant. This exemption is only intended for remote rural sources whose emissions would be very unlikely to interact with other significant sources of VOC or NO_x to form additional oxidant.[4]

As noted above, the determination as to whether a source would cause or contribute to a violation of an NAAQS should be made as of the new source's start-up date. Therefore, if a designated nonattainment area is projected to be an attainment area as part of an approved SIP control strategy by the new source start-up date, offsets would not be required if the new source would not cause a new violation.

D. *Sources locating in "clean areas," but would cause a new violating of an NAAQS.* If the reviewing authority finds that the emissions from a proposed source would cause a new violation of an NAAQS, but would not contribute to an existing violation, approval may be granted only if both of the following conditions are met:

Condition 1. The new source is required to meet a more stringent emission limitation[5] and/or the control of existing sources below allowable levels is required so that the source will not cause a violation of any NAAQS.

Condition 2. The new emission limitations for the new source as well as any existing sources affected must be enforceable in accordance with the mechanisms set forth in Section V of this appendix.

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[4] The discussion in this paragraph is a proposal, but represents EPA's interim policy until final rulemaking is completed.

[5] If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see Part V). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under Section 304. Hereafter, the term "emission limitation" shall also include such design, operational, or equipment standards.

IV. Sources That Would Locate in a Designated Nonattainment Area

A. *Conditions for Approval.* If the reviewing authority finds that the major stationary source or major modification would be constructed in an area designated in 40 CFR 81.300 *et seq* as nonattainment for a pollutant for which the stationary source or modification is major, approval may be granted only if the following conditions are met:

Condition 1. The new source is required to meet an emission Limitation[6] which specifies the lowest achievable emission rate for such source.[7]

Condition 2. The applicant must certify that all existing major sources[8] owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the appplicant) in the same State as the proposed source are in compliance with all applicable emission limitations and standards under the Act (or are in compliance with an expeditious schedule which is Federally enforceable or contained in a court decree).

Condition 3. Emission reductions ("offsets") from existing sources in the area of the proposed source (whether or not under the same ownership) are required such that there will be reasonable progress toward attainment of the applicable NAAQs.[8a]

Condition 4. The emission offsets will provide a positive net air quality benefit in the affected area (see Section IV.D. below).[9] Atmospheric simulation modeling is not necessary for volatile organic compounds and NO_x. Fulfillment of Condition 3 and Section IV.D. will be considered adequate to meet this condition.

B. *Exemptions from certain conditions.* The reviewing authority may exempt the following sources from Condition 1 under Section III or Conditions 3 and 4. Section IV.A.: (i) Resource recovery facilities burning municipal solid waste, and (ii) sources which must switch fuels due to lack of adequate fuel supplies or where a source is required to be modified as a result of EPA regulations (e.g., lead-in-fuel requirements) and no exemption from such regulation is available to the source. Such an exemption may be granted only if:

1. The applicant demonstrates that it made its best efforts to obtain sufficient emission offsets to comply with Condition 1 under Section III or Conditions 3 and 4 under Section IV.A. and that such efforts were unsuccessful;

2. The applicant has secured all available emission offsets; and

3. The applicant will continue to seek the necessary emission offsets and apply them when they become available.

Such an exemption may result in the need to revise the SIP to provide additional control of existing sources.

Temporary emission sources, such as pilot plants, portable facilities which will be relocated outside of the nonattainment area after a short period of time, and emissions resulting from the construction phase of a new source, are exempt from Conditions 3 and 4 of this section.

C. *Baseline for determining credit for emission and air quality offsets.* The baseline for determining credit for emission and air quality offsets will be the SIP emission limitations in effect at the time the application to construct or modify a source is filed. Thus, credit for emission offset purposes may be allowable for existing control that goes beyond that required by the SIP. Emission offsets generally should be made on a pounds per hour basis when all facilities involved in the emission offset calculations are operating at their maximum expected or allowed production rate. The reviewing agency should specify other averaging periods (e.g., tons per year) in addition to the pounds per hour basis if necessary to carry out the intent of this Ruling. When offsets are calculated on a tons per year basis, the baseline emissions for existing sources providing the offsets should be calculated using the actual annual operating hours for the previous one or two year period (or other appropriate period if warranted by cyclical business conditions). Where the SIP requires certain hardware controls in lieu of an emission limitation (e.g., floating roof tanks for petroleum storage), baseline allowable emissions should be based on actual operating conditions for the previous one or two year period (i.e., actual throughput and vapor pressures) in conjunction with the required hardware controls.

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[6] If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see Part V). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under Section 304. Hereafter, the term "emission limitation" shall also include such design, operational, or equipment standards.

[7] Required only for those pollutants for which the increased allowable emissions exceed 50 tons per year, 1000 pounds per day, or 100 pounds per hour, although the reviewing authority may address other pollutants if deemed appropriate. The preceding hourly and daily rates shall apply only with respect to a pollutant for which a national ambient air quality standard, for a period less than 24 hours or for a 24-hour period, as appropriate, has been established.

[8] Subject to the provisions of section IV.C. below.

[8a] The discussion in this paragraph is a proposal, but represents EPA's interim policy until final rulemaking is completed.

[9] Required only for those pollutants for which the increased allowable emissions exceed 50 tons per year, 1000 pounds per day, or 100 pounds per hour, although the reviewing authority may address other pollutants if deemed appropriate. The preceding hourly and daily rates shall apply only with respect to a pollutant for which a national ambient air quality standard, for a period less than 24 hours or for a 24-hour period, as appropriate, has been established.

1. *No meaningful or applicable SIP requirement.* Where the applicable SIP does not contain an emission limitation for a source or source category, the emission offset baseline involving such sources shall be the actual emissions determined in accordance with the discussion above regarding operating conditions.

Where the SIP emission limit allows greater emissions than the potential emission rate of the source (as when a State has a single particulate emission limit for all fuels), emission offset credit will be allowed only for control below the potential emission rate.

2. *Combustion of fuels.* Generally, the emissions for determining emission offset credit involving an existing fuel combustion source will be the allowable emissions under the SIP for the type of fuel being burned at the time the new source application is filed (i.e., if the existing source has switched to a different type of fuel at some earlier date, any resulting emission reduction [either actual or allowable] shall not be used for emission offset credit). If the existing source commits to switch to a cleaner fuel at some future date, emission offset credit based on the allowable emissions for the fuels involved is not acceptable unless the permit is conditioned to require the use of a specified alternative control measure which would achieve the same degree of emission reduction should the source switch back to a dirtier fuel at some later date. The reviewing authority should ensure that adequate long-term supplies of the new fuel are available before granting emission offset credit for fuel switches.

3. *Operating hours and source shutdown.* A source may be credited with emission reductions achieved by shutting down an existing source or permanently curtailing production or operating hours below baseline levels (see initial discussion to this Section C) provided, that the work force to be affected has been notified of the proposed shutdown or curtailment. Emission offsets that involve reducing operating hours or production or source shutdowns must be legally enforceable, as in the case for all emission offset situations.[10]

4. *Credit for hydrocarbon substitution.* As set forth in the Agency's "Recommended Policy on Control of Volatile Organic Compounds" (42 FR 35314, July 8, 1977), EPA has found that almost all non-methane hydrocarbons are photochemically reactive and that low reactivity hydrocarbons eventually form as much ozone as the highly reactive hydrocarbons. Therefore, no emission offset credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed in Table 1 of the above policy statement.

5. *"Banking" of emission offset credit.* For new sources obtaining permits by applying offsets after January 16, 1979, the reviewing authority may allow offsets that exceed the requirements of reasonable progress toward attainment (Condition 3) to be "banked" (i.e., saved to provide offsets for a source seeking a permit in the future) for use under this Ruling. Likewise, the reviewing authority may allow the owner of an existing source that reduces its own emissions to bank any resulting reductions beyond those required by the SIP for use under this Ruling, even if none of the offsets are applied immediately to a new source permit. A reviewing authority may allow these banked offsets to be used under the preconstruction review program required by Part D, as long as these banked emissions are identified and accounted for in the SIP control strategy. A reviewing authority may not approve the construction of a source using banked off-

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[10] Source shutdowns and curtailments in production or operating hours occurring prior to the date the new source application is filed generally may not be used for emission offset credit. However, where an applicant can establish that it shut down or curtailed production after August 7, 1977, or less than one year prior to the date of permit application, whichever is earlier, and the proposed new source is a replacement for the shutdown or curtailment, credit for such shutdown or curtailment may be applied to offset emissions from the new source.

sets if the new source would interfere with the SIP control strategy or if such use would violate any other condition set forth for use of offsets. To preserve banked offsets, the reviewing authority should identify them in either a SIP revision or a permit, and establish rules as to how and when they may be used.

D. *Location of offsetting emissions.* In the case of emission offsets involving volatile organic compounds (VOC), the offsets may be obtained from sources located anywhere in the broad vicinity of the proposed new source. Generally, offsets will be acceptable if obtained from within the same AQCR as the new source or from other areas which may be contributing to the ozone problem at the proposed new source location. As with other pollutants, it is desirable to obtain offsets from sources located as close to the proposed new source site as possible. If the proposed offsets would be from sources located at greater distances from the new source, the reviewing authority should increase the ratio of the required offsets and require a showing that nearby offsets were investigated and reasonable alternatives were not available.[11]

Offsets for NO_x sources may also be obtained within the broad area of nonattainment. This is because areawide ozone and NO_x levels are generally not as dependent on specific hydrocarbon or NO_x source location as they are on overall area emissions. Since the air quality impact of SO_2, particulate and carbon monoxide sources is site dependent, simple areawide mass emission offsets are not appropriate. For these pollutants, the reviewing authority should consider atmospheric simulation modeling to ensure that the emission offsets provide a positive net air quality benefit. However, to avoid unnecessary consumption of limited, costly and time consuming modeling resources, in most cases it can be assumed that if the emission offsets are obtained from an existing source on the same premises or in the immediate vicinity of the new source, and the pollutants disperse from substantially the same effective stack height, the air quality test under Condition 4 of Section IV.A. of this appendix will be met. Thus, when stack emissions are offset against a ground level source at the same site, modeling would be required. The reviewing authority may perform this analysis or require the applicant to submit appropriate modeling results.

E. *Reasonable progress towards attainment.* As long as the emission offset is greater than one-for-one, and the other criteria set forth above are met, EPA does not intend to question a reviewing authority's judgment as to what constitutes reasonable progress towards attainment as required under Condition 3 in Section IV.A. of this appendix. This does not apply to "reasonable further progress" as required by Section 173.

V. ADMINISTRATIVE PROCEDURES

The necessary emission offsets may be proposed either by the owner of the proposed source or by the local community or the State. The emission reduction committed to must be enforceable by authorized State and/or local agencies and under the Clean Air Act, and must be accomplished by the new source's start-up date. If emission reductions are to be obtained in a State that neighbors the State in which the new source is to be located, the emission reductions committed to must be enforceable by the neighboring State and/or local agencies and under the Clean Air Act. Where the new facility is a replacement for a facility that is being shut down in order to provide the necessary offsets, the reviewing authority may allow up to 180 days for shakedown of the new facility before the existing facility is required to cease operation.

A. *Source initiated emission offsets.* A source may propose emission offsets which involve: (1) Reductions from sources controlled by the source owner (internal emission offsets); and/or (2) reductions from neighboring sources (external emission offsets). The source does not have to investigate all possible emission offsets. As long as the emission offsets obtained represent reasonable progress toward attainment, they will be acceptable. It is the reviewing authority's responsibility to assure that the emission offsets will be as effective as proposed by the source. An internal emission offset will be considered enforceable if it is made a SIP requirement by inclusion as a condition of the new source permit and the permit is forwarded to the appropriate EPA Regional Office.[12] An external emission offset will not be enforceable unless the affected source(s) providing the emission reductions is subject to a new SIP requirement to ensure that its emissions will be reduced by a specified amount in a specified time. Thus, if the source(s) providing the emission reductions does not obtain the necessary reduction, it will be in violation of a SIP requirement and subject to enforcement action by EPA, the State and/or private parties.

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[11] The discussion in this paragraph is a proposal, but represents EPA's interim policy until final rulemaking is completed.

[12] The emission offset will, therefore, be enforceable by EPA under Section 113 as an applicable SIP requirement and will be enforceable by private parties under Section 304 as an emission limitation.

The form of the SIP revision may be a State or local regulation, operating permit condition, consent or enforcement order, or any other mechanism available to the State that is enforceable under the Clean Air Act. If a SIP revision is required, the public hearing on the revision may be substituted for the normal public comment procedure required for all major sources under 40 CFR 51.18. The formal publication of the SIP revision approval in the FEDERAL REGISTER need not appear before the source may proceed with construction. To minimize uncertainty that may be caused by these procedures, EPA will, if requested by the State, propose a SIP revision for public comment in the FEDERAL REGISTER concurrently with the State public hearing process. Of course, any major change in the final permit/SIP revision submitted by the State may require a reproposal by EPA.

B. *State or community initiated emission offsets.* A State or community which desires that a source locate in its area may commit to reducing emissions from existing sources (including mobile sources) to sufficiently outweigh the impact of the new source and thus open the way for the new source. As with source-initiated emission offsets, the commitment must be something more than one-for-one. This commitment must be submitted as a SIP revision by the State.

VI. POLICY WHERE ATTAINMENT DATES HAVE NOT PASSED

In some cases, the dates for attainment of primary standards specified in the SIP under Section 110 have not yet passed due to a delay in the promulgation of a plan under this section of the Act. In addition the Act provides more flexibility with respect to the dates for attainment of secondary NAAQS than for primary standards. Rather than setting specific deadlines, Section 110 requires secondary NAAQS to be achieved within a "reasonable time". Therefore, in some cases, the date for attainment of secondary standards specified in the SIP under Section 110 may also not yet have passed. In such cases, a new source locating in an area designated in 40 CFR 81.3000 *et seq.* as nonattainment (or, where Section III of this Ruling is applicable, a new source which would cause or contribute to an NAAQS violation) may be exempt from the Conditions of Section IV.A. so long as the new source meets the applicable SIP emissions limitations and will not interfere with the attainment date specified in the SIP under Section 110 of the Act.

(Sec. 129(a), Pub. L. 95-95 (note under 42 U.S.C. 7502), and Sec. 301 of the Clean Air Act, as amended (42 U.S.C. 7601))

[44 FR 3282, Jan. 16, 1979, as amended at 45 FR 31311, May 13, 1980]

EFFECTIVE DATE NOTE: By order published at 45 FR 31307, May 13, 1980, regulations of Appendix S, Part 51, were stayed, in part, until further notice.

APPENDIX T—[RESERVED]

APPENDIX U—CLEAN AIR ACT SECTION 174 GUIDELINES

GUIDANCE ON DESIGNATION OF LEAD PLANNING ORGANIZATIONS FOR NONATTAINMENT AREAS AND ON DETERMINATION OF INTERAGENCY RESPONSIBILITIES, DECEMBER 1977, ISSUED JOINTLY BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY AND THE U.S. DEPARTMENT OF TRANSPORTATION, WASHINGTON, D.C.

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ATTACHMENT A—LIST OF KEY DATES

ATTACHMENT B—SECTION 174

General questions of any or the material covered by this guideline should be sent to the Office of Transportation and Land Use Policy (AW-445), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, Attention: Ms. Martha Burke. Ms. Burke's telephone number is (202) 755-0570. Questions concerning specific state or local areas should be directed to the appropriate EPA regional office.

1. INTRODUCTION

1.1 Applicability.

These guidelines are applicable to all metropolitan area regions or portions of regions where the national ambient air quality standards for ozone or carbon monoxide will not be attained by July 1, 1979.

1.2 Purposes.

The purposes of these guidelines include:

1. To recommend procedures and criteria for determining a lead agency to be responsible for coordinating the preparation of the implementation plan revisions called for by the 1977 amendments to the Clean Air Act (Pub. L. 95-95) in metropolitan area regions

code of
federal regulations

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not limited to provisions specifying compliance schedules, emission limitations, and dates for attainment of national standards; if:

(a) The provision was promulgated by the Administrator, and

(b) The plan, as revised, will be consistent with the act and with the requirements applicable to implementation plans under Part 51 of this chapter.

[38 FR 12698, May 14, 1973]

§ 52.20 Attainment dates for national standards.

Each subpart contains a section which specifies the latest dates by which national standards are to be attained in each region in the State. An attainment date which only refers to a month and a year (such as July 1975) shall be construed to mean the last day of the month in question. However, the specification of attainment dates for national standards does not relieve any State from the provisions of § 51.15 of this chapter which require all sources and categories of sources to comply with applicable requirements of the plan—

(a) As expeditiously as practicable where the requirement is part of a control strategy designed to attain a primary standard, and

(b) Within a reasonable time where the requirement is part of a control strategy designed to attain a secondary standard.

[37 FR 19808, Sept. 22, 1972, as amended at 39 FR 34535, Sept. 26, 1974]

§ 52.21 Prevention of significant deterioration of air quality.

(a) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in Subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in Subparts B through DDD of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Goverment and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) "Major stationary source" means—

(i) Any of the following stationary sources of air pollutants which emit, or have the potential to emit, 100 tons per year or more of any air pollutant regulated under the Clean Air Act (the "Act"): Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300 thousand barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants; and

(ii) Notwithstanding the source sizes specified in paragraph (b)(1)(i) of this section, any source which emits, or has the potential to emit, 250 tons per year or more of any pollutant regulated under the Act.

(2) "Major modification" means any physical change in, change in the method of operation of, or addition to

a stationary source which increases the potential emission rate of any air pollutant regulated under the act (including any not previously emitted and taking into account all accumulated increases in potential emissions occurring at the source since August 7, 1977, or since the time of the last construction approval issued for the source pursuant to this section, whichever time is more recent, regardless of any emission reductions achieved elsewhere in the source) by either 100 tons per year or more for any source category identified in paragraph (b)(1)(i) of this section, or by 250 tons per year or more for any stationary source.

(i) A physical change shall not include routine maintenance, repair and replacement.

(ii) A change in the method of operation, unless previously limited by enforceable permit conditions, shall not include:

(*a*) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(*b*) An increase in the hours of operation;

(*c*) Use of an alternative fuel or raw material by reason of an order in effect under Sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), or by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act;

(*d*) Use of an alternative fuel or raw material, if prior to January 6, 1975, the source was capable of accommodating such fuel or material; or

(*e*) Use of an alternative fuel by reason of an order or rule under Section 125 of the Act;

(*f*) Change in ownership of the source.

(3) "Potential to emit" means the capability at maximum capacity to emit a pollutant in the absence of air pollution control equipment. "Air pollution control equipment" includes control equipment which is not, aside from air pollution control laws and regulations, vital to production of the normal product of the source or to its normal operation. Annual potential shall be based on the maximum annual rated capacity of the source, unless the source is subject to enforceable permit conditions which limit the annual hours of operation. Enforceable permit conditions on the type or amount of materials combusted or processed may be used in determining the potential emission rate of a source.

(4) "Source" means any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)

(5) "Facility" means an identifiable piece of process equipment. A source is composed of one or more pollutant-emitting facilities.

(6) "Fugitive dust" means particulate matter composed of soil which is uncontaminated by pollutants resulting from industrial activity. Fugitive dust may include emissions from haul roads, wind erosion of exposed soil surfaces and soil storage piles and other activities in which soil is either removed, stored, transported, or redistributed.

(7) "Construction" means fabrication, erection, installation, or modification of a source.

(8) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of physical on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of construction of the source to be completed within a reasonable time.

(9) "Necessary preconstruction approvals or permits" means those permits or approvals required under Federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State implementation plan.

(10) "Best available control technology" means an emission limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under the act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Part 60 and Part 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, a design, equipment, work practice or operational standard, or combination thereof, may be prescribed instead to require the application of best available control technology. Such standard shall, to the degree possible, set forth the emission reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(11) "Baseline concentration" means that ambient concentration level reflecting actual air quality as of August 7, 1977, minus any contribution from major stationary sources and major modifications on which construction commenced on or after January 6, 1975. The baseline concentration shall include contributions from:

(i) The actual emissions of other sources in existence on August 7, 1977, except that contributions from facilities within such existing sources for which a plan revision proposing less restrictive requirements was submitted on or before August 7, 1977, and was pending action by the Administrator on that date shall be determined from the allowable emissions of such facilities under the plan as revised; and

(ii) The allowable emissions of major stationary sources and major modifications which commenced construction before January 6, 1975, but were not in operation by August 7, 1977.

(12) "Federal Land Manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(13) "High terrain" means any area having an elevation 900 feet or more above the base of the stack of a facility.

(14) "Low terrain" means any area other than high terrain.

(15) "Indian Reservation" means any Federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(16) "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(17) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceed 50 percent of the fixed capital cost of a comparable entirely new facility or source. However, any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed source will be treated as a new source for purposes of this section, except that use of an alternative fuel or raw material by reason of an order in effect under section 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act, or by reason of an order or rule under section 125 of the act, shall not be considered reconstruction. In determining best available control technology for a reconstructed source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a standard of performance under 40 CFR Part 60 is applicable to such source.

(18) "Fixed capital cost" means the capital needed to provide all of the depreciable components.

(19) "Allowable emissions" means the emission rate calculated using the maximum rated capacity of the source (unless the source is subject to enforceable permit conditions which limit the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) Applicable standards as set forth in 40 CFR Part 60 and Part 61,

(ii) The applicable State implementation plan emission limitation, or

(iii) The emission rate specified as a permit condition.

(c) *Ambient air increments.* In areas designated as Class I, II or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Maximum allowable increase

[MICROGRAMS PER CUBIC METER]

Pollutant	
Class I	
Particulate matter:	
Annual geometric mean	5
24-h maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-h maxium	5
3-h maximum	25
CLASS II	
Particulate matter:	
Annual geometric mean	19
24-h maximum	37
Sulfur dioxide:	
Annual arithmetic	20
24-h maximum	91
3-h maximum	512
CLASS III	
Particulate matter:	
Annual geometric mean	37
24-h maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-h maximum	182
3-h maximum	700

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

(d) *Ambient air ceilings.* No concentration of a polutant shall exceed:

(1) The concentration permitted under the national secondary ambient air quality standard, or

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

(e) *Restrictions on area classifications.* (1) All of the following areas which were in existence on August 7, 1977, shall be Class I areas and may not be redesignated:

(i) International parks,

(ii) National wilderness areas which exceed 5,000 acres in size,

(iii) National memorial parks which exceed 5,000 acres in size, and

(iv) National parks which exceed 6,000 acres in size.

(2) Areas which were redesignated as Class I under regulations promulgated before August 7 1977, shall remain Class I, but may be redesignated as provided in this section.

(3) Any other area, unless otherwise specified in the legislation creating such an area, is initially designated Class II, but may be redesignated as provided in this section.

(4) The following areas may be redesignated only as Class I or II:

(i) An area which as of August 7, 1977, exceeded 10,000 acres in size and was a national monument, a national primitive area, a national preserve, a national recreational area, a national wild and scenic river, a national wildlife refuge, a national lakeshore or seashore; and

(ii) A national park or national wilderness area established after August 7, 1977, which exceeds 10,000 acres in size.

(f) *Exclusions from increment consumption.* (1) Upon written request of the Governor, made after notice and opportunity for at least one public hearing to be held in accordance with procedures established in § 51.4 of this chapter, the Administrator shall exclude the following concentrations in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under Sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary activities; and

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration.

(2) No exclusion under paragraph (f)(1) (i) or (ii) of this section shall apply more than five years after the effective date of the order to which paragraph (f)(1)(i) of this section refers or the plan to which paragraph (f)(1)(ii) of this section refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) No exclusion under paragraph (f) of this section shall occur after March 19, 1979, if a State implementation plan revision meeting the requirements of 40 CFR 51.24 has not been submitted to the Administrator by that time.

(g) *Redesignation.* (1) All areas (except as otherwise provided under paragraph (e) of this section) are designated Class II as of December 5, 1974. Redesignation (except as otherwise precluded by paragraph (e) of this section) may be proposed by the respective States or Indian Governing Bodies, as provided below, subject to approval by the Administrator as a revision to the applicable State implementation plan.

(2) The State may submit to the Administrator a proposal to redesignate areas of the State Class I or Class II provided that:

(i) At least one public hearing has been held in accordance with procedures established in § 51.4 of this chapter;

(ii) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation were notified at least 30 days prior to the public hearing;

(iii) A discussion of the reasons for the proposed redesignation, including a satisfactory description and analysis of the health, environmental, economic, social and energy effects of the proposed redesignation, was prepared and made available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contained appropriate notification of the availability of such discussion;

(iv) Prior to the issuance of notice respecting the redesignation of an area that includes any Federal lands, the State has provided written notice to the appropriate Federal Land Manager and afforded adequate opportunity (not in excess of 60 days) to confer with the State respecting the redesignation and to submit written comments and recommendations. In redesignating any area with respect to which any Federal Land Manager had submitted written comments and recommendations, the State shall have published a list of any inconsistency between such redesignation and such comments and recommendations (together with the reasons for making such redesignation against the recommendation of the Federal Land Manager); and

(v) The State has proposed the redesignation after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

(3) Any area other than an area to which paragraph (e) of this section refers may be redesignated as Class III if—

(i) The redesignation would meet the requirements of paragraph (g)(2) of this section;

(ii) The redesignation, except any established by an Indian Governing Body, has been specifically approved by the Governor of the State, after consultation with the appropriate committees of the legislature, if it is in session, or with the leadership of the legislature, if it is not in session (unless State law provides that the redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area to be redesignated enact legislation or pass resolutions concurring in the redesignation:

(iii) The redesignation would not cause, or contribute to, a concentration of any air pollutant which would exceed any maximum allowable increase permitted under the classification of any other area or any national ambient air quality standard; and

(iv) Any permit application for any major stationary source or major modification, subject to review under paragraph (l) of this section, which could receive a permit under this section only if the area in question were redesignated as Class III, and any material submitted as part of that application, were available insofar as was practicable for public inspection prior to any public hearing on redesignation of the area as Class III.

(4) Lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III: *Provided*, That:

(i) The Indian Governing Body has followed procedures equivalent to those required of a State under paragraphs (g)(2), (g)(3)(iii), and (g)(3)(iv) of this section; and

(ii) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located and which border the Indian Reservation.

(5) The Administrator shall disapprove, within 90 days of submission, a proposed redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this paragraph or is inconsistent with paragraph (e) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(6) If the Administrator disapproves any proposed redesignation, the State or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator.

(h) *Stack heights*. (1) The degree of emission limitation required for control of any air pollutant under this section shall not be affected in any manner by—

(i) So much of the stack height of any source as exceeds good engineering practice, or

(ii) Any other dispersion technique.

(2) Paragraph (h)(1) of this section shall not apply with respect to stack heights in existence before December 31, 1970, or to dispersion techniques implemented before then.

(i) *Review of major stationary sources and major modifications—Source applicability and general exemptions*. (1) No major stationary source or major modification shall be constructed unless the requirements of paragraphs (j) through (r) of this section, as applicable, have been met. The requirements of paragraphs (j) through (r) of this section shall apply to a proposed source or modification only with respect to those pollutants for which it would be a major stationary source or major modification.

(2) The requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification that was subject to the review requirements of 40 CFR 52.21(d)(1) for the prevention of significant deterioration as in effect before March 1, 1978, if the owner or operator—

(i) Obtained under 40 CFR 52.21 a final approval effective before March 1, 1978;

(ii) Commenced construction before March 19, 1979; and

(iii) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

(3) The requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification that was not subject to 40 CFR 52.21 as in effect before March 1, 1978, if the owner or operator—

(i) Obtained all final Federal, State and local preconstruction permits necessary under the applicable State implementation plan before March 1, 1978;

(ii) Commenced construction before March 19, 1979; and

(iii) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

(4) The requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification that was subject to 40 CFR 52.21 as in effect before March 1, 1978, if review of an application for approval for the source or modification under 40 CFR 52.21 would have been completed by March 1, 1978, but for an extension of the public comment period pursuant to a request for such an extension. In such a case, the application shall continue to be processed, and granted or denied, under 40 CFR 52.21 as in effect prior to March 1, 1978.

(5) The requirements of paragraphs (j), (l), (n) and (p) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that—

(i) As to that pollutant, the source or modification is subject to the emission offset ruling (41 FR 55524), as it may be amended, or to regulations approved or promulgated pursuant to Section 173 of the Act; and

(ii) The source or modification would impact no area attaining the national ambient air quality standards (either internal or external to areas designated as nonattainment under Section 107 of the Act).

(6) The requirements of paragraphs (j) through (r) of this section shall not apply, upon written request of the Governor of a State, to a nonprofit health or education institution to be located in that State.

(7) A portable facility which has previously received construction approval under the requirements of this section as applicable may relocate without again being subject to those requirements if—

(i) Emissions from the facility would not exceed allowable emissions;

(ii) Emissions from the facility would impact no Class I area and no area where an applicable increment is known to be violated; and

(iii) Notice is given to the Administrator at least 30 days prior to such relocation identifying the proposed new location and the probable duration of operation at such location.

(j) *Control technology review.* (1) A major stationary source or major modification shall meet all applicable emission limitations under the State implementation plan and all applicable emission standards and standards of performance under 40 CFR Part 60 and Part 61.

(2) A major stationary source or major modification shall apply best available control technology for each applicable pollutant, unless the increase in allowable emissions of that pollutant from the source or modification would be less than 50 tons per year, 1,000 pounds per day, or 100 pounds per hour, whichever is most restrictive.

(i) The preceding hourly and daily rates shall apply only with respect to a pollutant for which an increment, or national ambient air quality standard, for a period less than 24 hours or for a 24 hour period, as appropriate, has been established.

(ii) In determining whether and to what extent a modification would increase allowable emissions, there shall be taken into account no emission reductions achieved elsewhere at the source at which the modification would occur.

(3) In the case of a modification, the requirement for best available control technology shall apply only to each new or modified facility which would increase the allowable emissions of an applicable pollutant.

(4) Where a facility within a source would be modified but not reconstructed, the requirements for best available control technology, notwithstanding paragraph (j)(2) of this section, shall not apply to such facility if no net increase in emissions of an applicable pollutant would occur at the source, taking into account all emission increases and decreases at the source which would accompany the modifica-

tion, and no adverse air quality impact would occur.

(5) For phased construction projects the determination of best available control technology shall be reviewed, and modified as appropriate, at the latest reasonable time prior to commencement of construction of each independent phase of the proposed source or modification.

(k) *Exemptions from impact analyses.* (1) The requirements of paragraphs (l), (n), and (p) shall not apply to a major stationary source or major modification with respect to a particular pollutant, if—

(i) The increase in allowable emissions of that pollutant from the source or modification would impact no Class I area and no area where an applicable increment is known to be violated; and

(ii) The increase in allowable emissions of that pollutant from the source or modification would be less than 50 tons per year, 1000 pounds per day, or 100 pounds per hour, whichever is more restrictive; or

(iii) The emissions of the pollutant are of a temporary nature including but not limited to those from a pilot plant, a portable facility, construction, or exploration; or

(iv) A source is modified, but no increase in the net amount of emissions for any pollutant subject to a national ambient air quality standard and no adverse air quality impact would occur.

(2) The hourly and daily rates set in paragraph (k)(1)(ii) of this section shall apply only with respect to a pollutant for which an increment, or national ambient air quality standard, for a period of less than 24 hours or for a 24 hour period, as appropriate, has been established.

(3) In determining for the purpose of paragraph (k)(1)(ii) of this section whether and to what extent the modification would increase allowable emissions, there shall be taken into account no emission reduction achieved elsewhere at the source at which the modification would occur.

(4) In determining for the purpose of paragraph (k)(1)(iv) of this section whether and to what extent there would be an increase in the net amount of emissions for any pollutant subject to a national ambient air quality standard from the source which is modified, there shall be taken into account all emission increases and decreases occurring at the source since August 7, 1977.

(5) The requirements of paragraphs (l), (n) and (p) of this section shall not apply to a major stationary source or to a major modification with respect to emissions from it which the owner or operator has shown to be fugitive dust.

(l) *Air quality review.* The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions, would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

(m) *Air quality models.* (1) All estimates of ambient concentrations required under this section shall be based on the applicable air quality models, data bases, and other requirements specified in the "Guideline on Air Quality Models" (OAQPS 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, April 1978). This document is incorporated by reference. On April 27, 1978, the Office of the Federal Register approved this document for incorporation by reference. A copy of the guideline is on file in the Federal Register Library.

(2) Where an air quality impact model specified in the "Guideline on Air Quality Models" is inappropriate, the model may be modified or another model substituted. Such a change must be subject to notice and opportunity for public comment under paragraph (r) of this section. Written approval of the Administrator must be obtained for any modification or substitution: Methods like those outlined in the "Workbook for the Comparison of Air Quality Models" (U.S. Environmental Protection Agency, Office of

Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, May, 1978) should be used to determine the comparability of air quality models.

(3) The documents referenced in this paragraph are available for public inspection at EPA's Public Information Reference Unit and at the libraries of each of the ten EPA Regional Offices. Copies are available as supplies permit from the Library Service Office (MD-35), U.S. Environmental Protection Agency, Research Triangle Park, N.C. 27711. Also, copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, Va. 22161.

(n) *Monitoring.* (1) The owner or operator of a proposed source or modification shall, after construction of the source or modification, conduct such ambient air quality monitoring as the Administrator determines may be necessary to establish the effect which emissions from the source or modification of a pollutant for which a national ambient air quality standard exists (other than non-methane hydrocarbons) may have, or is having, on air quality in any area which such emissions would affect.

(2) As necessary to determine whether emissions from the proposed source or modification would cause or contribute to a violation of a national ambient air quality standard, any permit application submitted after August 7, 1978, shall include an analysis of continuous air quality monitoring data for any pollutant emitted by the source or modification for which a national ambient air quality standard exists, except non-methane hydrocarbons. Such data shall relate to, and shall have been gathered over, the year preceding receipt of the complete application, unless the owner or operator demonstrates to the Administrator's satisfaction that such data gathered over a portion or portions of that year or another representative year would be adequate to determine that the source or modification would not cause or contribute to a violation of a national ambient air quality standard.

(3) The owner or operator shall meet the requirements of Appendix B to Part 58 of this chapter during the operation of monitoring stations required by paragraph (n)(1) of this section as follows:

(i) No later than January 1, 1980, for existing stations, or

(ii) For new stations, at the time the station is put into operation.

(o) *Source information.* The owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under this section.

(1) With respect to a source or modification to which paragraphs (j), (l), (n) and (p) of this section apply, such information shall include:

(i) A description of the nature, location, design capacity, and typical operating schedule of the source or modification, including specifications and drawings showing its design and plant layout;

(ii) A detailed schedule for construction of the source or modification;

(iii) A detailed description as to what system of continuous emission reduction is planned for the source or modification, emission estimates, and any other information necessary to determine that best available control technology would be applied.

(2) Upon request of the Administrator, the owner or operator shall also provide information on:

(i) The air quality impact of the source or modification, including meteorological and topographical data necessary to estimate such impact; and

(ii) The air quality impacts, and the nature and extent of any or all general commercial, residential, industrial, and other growth which has occurred since August 7, 1977, in the area the source or modification would affect.

(p) *Additional impact analyses.* (1) The owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

(2) The owner or operator shall provide an analysis of the air quality

impact projected for the area as a result of general commercial, residential, industrial and other growth associated with the source or modification.

(q) *Sources impacting Federal Class I areas—additional requirements*—(1) *Notice to Federal Land Managers.* The Administrator shall provide notice of any permit application for a proposed major stationary source or major modification the emissions from which would affect a Class I area to the Federal Land Manager, and the Federal official charged with direct responsibility for management, of any lands within any such area. The Administrator shall provide such notice promptly after receiving the application. The Administrator shall also provide the Federal Land Manager and such Federal officials with a copy of the preliminary determination required under paragraph (r) of this section, and shall make available to them any materials used in making that determination, promptly after the Administrator makes it.

(2) *Federal Land Manager.* The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands have an affirmative responsibility to protect the air quality related values (including visibility) of such lands and to consider, in consultation with the Administrator, whether a proposed source or modification will have an adverse impact on such values.

(3) *Denial—impact on air quality related values.* The Federal Land Manager of any such lands may demonstrate to the Administrator that the emissions from a proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of those lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Administrator concurs with such demonstration, then he shall not issue the permit.

(4) *Class I variances.* The owner or operator of a proposed source or modification may demonstrate to the Federal Land Manager that the emissions from such source or modification would have no adverse impact on the air quality related values of any such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Federal Land Manager concurs with such demonstration and he so certifies, the State may authorize the Administrator: *Provided,* That the applicable requirements of this section are otherwise met, to issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide and particulate matter would not exceed the followng maximum allowable increases over baseline concentration for such pollutants:

	Maximum allowable increase (micrograms per cubic meter)
Particulate matter:	
Annual geometric mean	19
24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	325

(5) *Sulfur dioxide variance by Governor with Federal Land Manager's concurrence.* The owner or operator of a proposed source or modification which cannot be approved under paragraph (q)(4) of this section may demonstrate to the Governor that the source cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for a period of twenty-four hours or less applicable to any Class I area and, in the case of Federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality related values of the area (including visibility). The Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may, after notice and public hearing, grant a variance from such maximum allowable increase. If such variance is granted, the Administrator shall issue a permit to such source or modification pursuant to the requirements of paragraph

(q)(7) of this section: *Provided*, That the applicable requirements of this section are otherwise met.

(6) *Variance by the Governor with the President's concurrence.* In any case where the Governor recommends a variance in which the Federal Land Manager does not concur, the recommendations of the Governor and the Federal Land Manager shall be transmitted to the President. The President may approve the Governor's recommendation if he finds that the variance is in the national interest. If the variance is approved, the Administrator shall issue a permit pursuant to the requirements of paragraph (q)(7) of this section: *Provided*, That the applicable requirements of this section are otherwise met.

(7) *Emission limitations for Presidential or gubernatorial variance.* In the case of a permit issued pursuant to paragraph (q) (5) or (6) of this section the source or modification shall comply with such emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

Maximum Allowable Increase

[MICROGRAMS PER CUBIC METER]

Period of exposure	Terrain areas	
	Low	High
24-hr maximum	36	62
3-hr maximum	130	221

(r) *Public participation.* (1) Within 30 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the applicant of any deficiency in the application or in the information submitted. In the event of such a deficiency, the date of receipt of the application shall be, for the purpose of this section, the date on which the Administrator received all required information.

(2) Within 1 year after receipt of a complete application, the Administrator shall make a final determination on the application. This involves performing the following actions in a timely manner:

(i) Make a preliminary determination whether construction should be approved, approved with conditions, or disapproved.

(ii) Make available in at least one location in each region in which the proposed source or modification would be constructed a copy of all materials the applicant submitted, a copy of the preliminary determination and a copy or summary of other materials, if any, considered in making the preliminary determination.

(iii) Notify the public, by advertisement in a newspaper of general circulation in each region in which the proposed source or modification would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and the opportunity for comment at a public hearing as well as written public comment.

(iv) Send a copy of the notice of public comment to the applicant and to officials and agencies having cognizance over the location where the proposed construction would occur as follows: State and local air pollution control agencies, the chief executives of the city and county where the source or modification would be located, any comprehensive regional land use planning agency and any State, Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the source or modification.

(v) Provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the source or modification, alternatives to the source or modification, the control technology required, and other appropriate considerations.

(vi) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing(s) in making a final decision on the approvability of the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making a final decision. The Administrator shall make all comments available for public inspection in the same locations where the Administrator made available preconstruction information relating to the proposed source or modification.

(vii) Make a final determination whether construction should be approved, approved with conditions, or disapproved pursuant to this section.

(viii) Notify the applicant in writing of the final determination and make such notification available for public inspection at the same location where the Administrator made available preconstruction information and public comments relating to the source or modification.

(3) The requirements of paragraph (r) of this section shall not apply to any major stationary source or major modification which paragraph (k) of this section would exempt from the requirements of paragraphs (l), (n), and (p), of this section but only to the extent that, with respect to each of the criteria for construction approval under the applicable State implementation plan and for exemption under paragraph (k) of this section, requirements providing the public with at least as much participation in each material determination as those of paragraph (r) of this section have been met in the granting of such construction approval.

(s) *Source obligation.* (1) Any owner or operator who constructs or operates a source or modification not in accordance with the application submitted pursuant to this section or with the terms of any approval to construct, or any owner or operator of a source or modification subject to this section who commences construction after the effective date of these regulations without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action.

(2) Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

(3) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the State implementation plan and any other requirements under local, State, or Federal law.

code of federal regulations

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Protection of Environment

PARTS 53 TO 80

Revised as of July 1, 1980

	Test a	*Test b*
Run 1.	100	115
Run 2.	95	120
Run 3.	110	125

5.2 Using Equation 1—

$$E_a=100+95+110/3=102$$
$$E_b=115+120+125/3=120$$

5.3 Using Equation 2—

$$S_a^2=(100-102)^2+(95-102)^2+(110-102)^2/3-1=58.5$$
$$S_b^2=(115-120)^2+(120-120)^2+(125-120)^2/3-1=25$$

5.4 Using Equation 3—

$$S_p=[(3-1)(58.5)+(3+1)(25)/3+3-2]^{1/2}=6.46$$

5.5 Using Equation 4—

$$t=\frac{120-102}{6.46\left[\frac{1}{3}+\frac{1}{3}\right]^{1/2}}=3.412$$

5.6 Since $(n^1+n^2-2)=4$, $t'=2.132$ (from Table 1). Thus since $t>t'$ the difference in the values of E_a and E_b is significant, and there has been an increase in emission rate to the atmosphere.

6. *Continuous Monitoring Data.*

6.1 Hourly averages from continuous monitoring devices, where available, should be used as data points and the above procedure followed.

(Sec. 114, Clean Air Act as amended 42 U.S.C. 7414))

[40 FR 58420, Dec. 16, 1975]

APPENDIX D—REQUIRED EMISSION INVENTORY INFORMATION

(a) Completed NEDS point source form(s) for the entire plant containing the designated facility, including information on the applicable criteria pollutants. If data concerning the plant are already in NEDS, only that information must be submitted which is necessary to update the existing NEDS record for that plant. Plant and point identification codes for NEDS records shall correspond to those previously assigned in NEDS; for plants not in NEDS, these codes shall be obtained from the appropriate Regional Office.

(b) Accompanying the basic NEDS information shall be the following information on each designated facility:

(1) The state and county identification codes, as well as the complete plant and point identification codes of the designated facility in NEDS. (The codes are needed to match these data with the NEDS data.)

(2) A description of the designated facility including, where appropriate:

(i) Process name.

(ii) Description and quantity of each product (maximum per hour and average per year).

(iii) Description and quantity of raw materials handled for each product (maximum per hour and average per year).

(iv) Types of fuels burned, quantities and characteristics (maximum and average quantities per hour, average per year).

(v) Description and quantity of solid wastes generated (per year) and method of disposal.

(3) A description of the air pollution control equipment in use or proposed to control the designated pollutant, including:

(i) Verbal description of equipment.

(ii) Optimum control efficiency, in percent. This shall be a combined efficiency when more than one device operates in series. The method of control efficiency determination shall be indicated (e.g., design efficiency, measured efficiency, estimated efficiency).

(iii) Annual average control efficiency, in percent, taking into account control equipment down time. This shall be a combined efficiency when more than one device operates in series.

(4) An estimate of the designated pollutant emissions from the designated facility (maximum per hour and average per year). The method of emission determination shall also be specified (e.g., stack test, material balance, emission factor).

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[40 FR 53349, Nov. 17, 1975]

PART 61—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

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AUTHORITY: Sec. 112, 301(a), Clean Air Act as amended (42 U.S.C. 7412, 7601(a)), unless otherwise noted.

SOURCE: 38 FR 8826, Apr. 6, 1973, unless otherwise noted.

Subpart A—General Provisions

§ 61.01 Applicability.

The provisions of this part apply to the owner or operator of any stationary source for which a standard is prescribed under this part.

§ 61.02 Definitions.

The terms used in this part are defined in the Act or in this section as follows:

"Act" means the Clean Air Act (42 U.S.C. 1857 et seq.).

"Administrator" means the Administrator of the Environmental Protection Agency or his authorized representative.

"Alternative method" means any method of sampling and analyzing for an air pollutant which is not a reference or equivalent method but which has been demonstrated to the Administrator's satisfaction to, in specific cases, produce results adequate for his determination of compliance.

"Commenced" means, with respect to the definition of "new source" in section 111(a)(2) of the Act, that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

"Compliance schedule" means the date or dates by which a source or category of sources is required to comply with the standards of this part and with any steps toward such compliance which are set forth in a waiver of compliance under § 61.11.

"Construction" means fabrication, erection, or installation of an affected facility.

"Effective date" is the date of promulgation in the FEDERAL REGISTER of an applicable standard or other regulation under this part.

"Equivalent method" means any method of sampling and analyzing for an air pollutant which has been demonstrated to the Administrator's satisfaction to have a consistent and quantitatively known relationship to the reference method, under specified conditions.

"Existing source" means any stationary source which is not a new source.

"Modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any hazardous air pollutant emitted by such source or which results in the emission of any hazardous air pollutant not previously emitted, except that:

(a) Routine maintenance, repair, and replacement shall not be considered physical changes, and

(b) The following shall not be considered a change in the method of operation:

(1) An increase in the production rate, if such increase does not exceed the operating design capacity of the stationary source;

(2) An increase in hours of operation.

"New source" means any stationary source, the construction or modification of which is commenced after the publication in the FEDERAL REGISTER of proposed national emission standards for hazardous air pollutants which will be applicable to such source.

"Owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

"Reference method" means any method of sampling and analyzing for an air pollutant, as described in Appendix B to this part.

"Standard" means a national emission standard for a hazardous air pollutant proposed or promulgated under this part.

"Startup" means the setting in operation of a stationary source for any purpose.

"Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant which has been designated as hazardous by the Administrator.

[44 FR 55174, Sept. 25, 1979]

§ 61.03 Units and abbreviations.

Used in this part are abbreviations and symbols of units of measure. These are defined as follows:

(a) System International (SI) units of measure:

A=ampere
g=gram
Hz=hertz
J=joule
K=degree Kelvin
kg=kilogram
m=meter
m^3=cubic meter
mg=milligram=10^{-3} gram
mm=millimeter=10^{-3} meter
Mg=megagram=10^{-6} gram
mol=mole
N=newton
ng=nanogram=10^{-9} gram
nm=nanometer=10^{-9} meter
Pa=pascal
s=second
V=volt
W=watt
Ω=ohm
μg=microgram=10^{-6} gram

(b) Other units of measure:

°C=degree Celsius (centigrade)
cfm=cubic feet per minute
cc=cubic centimeter
d=day
°F=degree Fahrenheit
ft^2=square feet
ft^3=cubic feet
gal=gallon
in=inch
in Hg=inches of mercury

in H_2O=inches of water
l=liter
lb=pound
lpm=liter per minute
min=minute
ml=milliliter=10^{-3} liter
oz=ounces
psig=pounds per square inch gage
°R=degree Rankine
μl=microliter=10^{-6} liter
v/v=volume per volume
yd^2=square yards
yr=year

(c) Chemical nomenclature:

Be=beryllium
Hg=mercury
H_2O=water

(d) Miscellaneous:

act=actual
avg=average
I.D.=inside diameter
M=molar
N=normal
O.D.=outside diameter
%=percent
std=standard

(Secs. 112 and 301(a), Clean Air Act, as amended (42 U.S.C. 1857c-7, 1857g(a)))

[42 FR 51574, Sept. 29, 1977]

§ 61.04 Address.

(a) All requests, reports, applications, submittals, and other communications to the Administrator pursuant to this part shall be submitted in duplicate and addressed to the appropriate Regional Office of the Environmental Protection Agency, to the attention of the Director, Enforcement Division. The regional offices are as follows:

Region I (Connecticut, Maine, New Hampshire, Massachusetts, Rhode Island, Vermont), John F. Kennedy Federal Building, Boston, Massachusetts 02203.
Region II (New York, New Jersey, Puerto Rico, Virgin Islands), Federal Office Building, 26 Federal Plaza (Foley Square), New York, N.Y. 10007.
Region III (Delaware, District of Columbia, Pennsylvania, Maryland, Virginia, West Virginia), Curtis Building, Sixth and Walnut Streets, Philadelphia, Pennsylvania 19106.
Region IV (Alabama, Florida, Georgia, Mississippi, Kentucky, North Carolina, South Carolina, Tennessee), Suite 300, 1421 Peachtree Street, Atlanta, Georgia 30309.
Region V (Illinois, Indiana, Minnesota, Michigan, Ohio, Wisconsin), 230 South Dearborn Street, Chicago, Illinois 60604.
Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas), 1600 Patterson Street, Dallas, Texas 75201.
Region VII (Iowa, Kansas, Missouri, Nebraska), 1735 Baltimore Street, Kansas City, Missouri 63108.
Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming), 196 Lincoln Towers, 1860 Lincoln Street, Denver, Colorado 80203.
Region IX (Arizona, California, Hawaii, Nevada, Guam, American Samoa), 100 California Street, San Francisco, California 94111.
Region X (Washington, Oregon, Idaho, Alaska), 1200 Sixth Avenue, Seattle, Washington 98101.

(b) Section 112(d) directs the Administrator to delegate to each State, when appropriate, the authority to implement and enforce the national emission standards for hazardous air pollutants for stationary sources located in such State. All information required to be submitted to EPA under paragraph (a) of this section, must also be submitted to the appropriate State Agency of any State to which this authority has been delegated (provided, that each specific delegation may exempt sources from a certain federal or State reporting requirement). The appropriate mailing address for those States whose delegation request has been approved is as follows:

(A) [Reserved]

(B) State of Alabama, Air Pollution Control Division, Air Pollution Control Commission, 645 S. McDonough Street, Montgomery, Alabama 36104.

(C) [Reserved]

(D) Arizona.

Maricopa County Department of Health Services, Bureau of Air Pollution Control, 1825 East Roosevelt Street, Phoenix, Ariz. 85006.

Pima County Health Department, Air Quality Control District, 151 West Congress, Tucson, Ariz. 85701.

(E) [Reserved]

(F) California.

Bay Area Air Pollution Control District, 939 Ellis Street, San Francisco, Calif. 94109.

Del Norte County Air Pollution Control District, Courthouse, Crescent City, Calif. 95531.

Fresno County Air Pollution Control District, 515 South Cedar Avenue, Fresno, Calif. 93702

Humboldt County Air Pollution Control District, 5600 South Broadway, Eureka, Calif. 95501.

Kern County Air Pollution Control District, 1700 Flower Street (P.O. Box 997), Bakersfield, Calif. 93302.

Madera County Air Pollution Control District, 135 West Yosemite Avenue, Madera, Calif. 93637.

Mendocino County Air Pollution Control District, County Courthouse, Ukiah, Calif. 94582.

Monterey Bay Unified Air Pollution Control District, 420 Church Street (P.O. Box 487), Salinas, Calif. 93901.

Northern Sonoma County Air Pollution Control District, 3313 Chanate Road, Santa Rosa, Calif. 95404.

Sacramento County Air Pollution Control District, 3701 Branch Center Road, Sacramento, Calif. 95827.

San Diego County Air Pollution Control District, 9150 Chesapeake Drive, San Diego, Calif. 92123.

San Joaquin County Air Pollution Control District, 1601 East Hazelton Street (P.O. Box 2009), Stockton, Calif. 95201.

Santa Barbara County Air Pollution Control District, 4440 Calle Real, Santa Barbara, Calif. 93110.

Shasta County Air Pollution Control District, 1855 Placer Street, Redding, Calif. 96001.

South Coast Air Quality Management District, 9420 Telstar Avenue, El Monte, Calif. 91731.

Stanislaus County Air Pollution Control District, 820 Scenic Drive, Modesto, Calif. 95350.

Trinity County Air Pollution Control District, Box AJ, Weaverville, Calif. 96093.

Ventura County Air Pollution Control District, 625 East Santa Clara Street, Ventura, Calif. 93001.

(G) State of Colorado, Colorado Air Pollution Control Division, 4210 East 11th Avenue, Denver, Colorado 80220.

(H) State of Connecticut, Department of Environmental Protection, State Office Building, Hartford, Connecticut 06115.

(I) State of Delaware (for asbestos, beryllium and mercury only): Delaware Department of Natural Resources and Environmental Control, Edward Tatnall Building, Dover, Delaware 19901.

(J)-(K) [Reserved]

(L) State of Georgia, Environmental Protection Division, Department of Natural Resources, 270 Washington Street, S.W., Atlanta, Georgia 30334.

(M)-(O) [Reserved]

(P) State of Indiana, Indiana Air Pollution Control Board, 1330 West Michigan Street, Indianapolis, Indiana 46206.

(Q)-(R) [Reserved]

(S) Division of Air Pollution Control, Department for Natural Resources and Environmental Protection, U.S. 127, Frankfort, Ky. 40601.

(T) [Reserved]

(U) State of Maine, Department of Environmental Protection, State House, Augusta, Maine 04330.

(V) State of Maryland, Bureau of Air Quality and Noise Control, Maryland State Department of Health and Mental Hygiene, 201 West Preston Street, Baltimore, Maryland 21201.

(W) Massachusetts Department of Environmental Quality Engineering, Division of Air Quality Control, 600 Washington Street, Boston, Massachusetts 02111.

(X) State of Michigan, Air Pollution Control Division, Michigan Department of Natural Resources, Stevens T. Mason Building, 8th Floor, Lansing, Michigan 48926.

(Y) Minnesota Pollution Control Agency, Division of Air Quality, 1935 West County Road B-2, Roseville, Minn. 55113.

(Z) [Reserved]

(AA) [Reserved]

(BB) State of Montana, Department of Health and Environmental Sciences, Cogswell Building, Helena, Mont. 59601.

(CC) [Reserved]

(DD) Nevada.

Clark County, County District Health Department, Air Pollution Control Division, 625 Shadow Lane, Las Vegas, Nev. 89106.

Washoe County District Health Department, Division of Environmental Protection, 10 Kirman Avenue, Reno, Nev. 89502.

(EE) New Hampshire Air Pollution Control Agency, Department of Health and Welfare, State Laboratory Building, Hazen Drive, Concord, New Hampshire 03301.

(FF) State of New Jersey: New Jersey Department of Environmental Protection, John Fitch Plaza, P.O. Box 2807, Trenton, New Jersey 08625.

(GG) [Reserved]

(HH) New York: New York State Department of Environmental Conservation, 50 Wolf Road, Albany, New York 12233, attention: Division of Air Resources.

(II) North Carolina Environmental Management Commission, Department of Natural and Economic Resources, Division of Environmental Management, P.O. Box 27687, Raleigh, North Carolina 27611. Attention: Air Quality Section.

(JJ) State of North Dakota, State Department of Health, State Capitol, Bismarck, North Dakota 58501.

(KK) Ohio

Montgomery County: Regional Air Pollution Control Agency, Montgomery County Combined General Health District, 451 West Third Street, Dayton, Ohio 45402.

Clarke, Darke, Greene, Miami and Preble Counties [except for all information required under § 61.22 (d) and (e)]: Montgomery County Combined General Health District, 451 West Third Street, Dayton, Ohio 45402.

(LL) [Reserved]

(MM) State of Oregon, Department of Environmental Quality, 1234 SW Morrison Street, Portland, Oregon 97205.

(NN)(i) Commonwealth of Pennsylvania (except for City of Philadelphia and Allegheny County) Pennsylvania Department of Environmental Resources, Bureau of Air Quality and Noise Control, Post Office Box 2063, Harrisburg, Pennsylvania 17120.

(ii) City of Philadelphia. Philadelphia Department of Public Health Air Management Services, 801 Arch Street, Philadelphia, Pennsylvania 19107.

(OO) State of Rhode Island, Department of Environmental Management, 83 Park Street, Providence, R.I. 02908.

(PP) State of South Carolina, Office of Environmental Quality Control, Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina 29201.

(QQ)-(RR) [Reserved]

(SS) State of Texas, Texas Air Control Board, 8520 Shoal Creek Boulevard, Austin, Texas 78758.

(TT) [Reserved]

(UU) State of Vermont, Agency of Environmental Protection, Box 489, Montpelier, Vermont 05602.

(VV) Commonwealth of Virginia, Virginia State Air Pollution Control Board, Room 1106, Ninth Street Office Building, Richmond, Virginia 23219.

(WW)(i) Washington; State of Washington, Department of Ecology, Olympia, Washington 98504.

(ii) Northwest Air Pollution Authority, 207 Pioneer Building, Second and Pine Streets, Mount Vernon, Washington 98273.

(iii) Puget Sound Air Pollution Control Agency, 410 West Harrison Street, Seattle, Washington 98119.

(iv) Spokane County Air Pollution Control Authority, North 811 Jefferson, Spokane, Washington 99201.

(v) Yakima County Clean Air Authority, County Courthouse, Yakima, Washington 98901.

(vi) Olympic Air Pollution Control Authority, 120 East State Avenue, Olympia, Washington 98501.

(vii) Southwest Air Pollution Control Authority, Suite 7601 H, NE Hazel Dell Avenue, Vancouver, Washington 98665.

(XX) [Reserved]

(YY) Wisconsin--Wisconsin Department of Natural Resources, P.O. Box 7921, Madison, Wisconsin 53707.

(ZZ) [Reserved]

(AAA) [Reserved]

(BBB) Commonwealth of Puerto Rico: Commonwealth of Puerto Rico Environmental Quality Board, P.O. Box 11785, Santurce, P.R. 00910.

(CCC) U.S. Virgin Islands: U.S. Virgin Islands Department of Conservation and Cultural Affairs, P.O. Box 578, Charlotte Amalie, St. Thomas, U.S. Virgin Islands 00801.

(Secs. 101, 110, 111, 114, 160-169, 301 of the Clean Air Act, as amended, (42 U.S.C. 7401, 7410, 7411, 7414, 7470—7479, 7491, 7601))

NOTE: For amendments to § 61.04 see the List of CFR Sections Affected appearing in the Finding Aids section of this volume.

§ 61.05 Prohibited activities.

(a) After the effective date of any standard prescribed under this part, no owner or operator shall construct or modify any stationary source subject to such standard without first obtaining written approval of the Administrator in accordance with this subpart, except under an exemption granted by the President under section 112(c)(2) of the act. Sources, the construction or modification of which commenced after the publication date of the standards proposed to be applicable to such source, are subject to this prohibition.

(b) After the effective date of any standard prescribed under this part, no owner or operator shall operate any new source in violation of such standard except under an exemption granted by the President under section 112(c)(2) of the act.

(c) Ninety days after the effective date of any standard prescribed under this part, no owner or operator shall operate any existing stationary source in violation of such standard, except under a waiver granted by the Administrator in accordance with this subpart or under an exemption granted by the President under section 112(c)(2) of the act.

(d) No owner or operator subject to the provisions of this part shall fail to report, revise reports, or report source test results as required under this part.

§ 61.06 Determination of construction or modification.

Upon written application by an owner or operator, the Administrator will make a determination of whether actions taken or intended to be taken by such owner or operator constitute construction or modification or the commencement thereof within the meaning of this part. The Administrator will within 30 days of receipt of sufficient information to evaluate an application, notify the owner or operator of his determination.

§ 61.07 Application for approval of construction or modification.

(a) The owner or operator of any new source to which a standard prescribed under this part is applicable shall, prior to the date on which construction or modification is planned to commence, or within 30 days after the effective date in the case of a new source that already has commenced construction or modification and has not begun operation, submit to the Administrator an application for approval of such construction or modification. A separate application shall be submitted for each stationary source.

(b) Each application shall include:

(1) The name and address of the applicant.

(2) The location or proposed location of the source.

(3) Technical information describing the proposed nature, size, design, operating design capacity, and method of operation of the source, including a description of any equipment to be used for control of emissions. Such technical information shall include calculations of emission estimates in sufficient detail to permit assessment of the validity of such calculations.

§ 61.08 Approval by Administrator.

(a) The Administrator will, within 60 days of receipt of sufficient information to evaluate an application under § 61.07, notify the owner or operator of approval or intention to deny approval of construction or modification.

(b) If the Administrator determines that a stationary source for which an application pursuant to § 61.07 was submitted will, if properly operated, not cause emissions in violation of a standard, he will approve the construction or modification of such source.

(c) Prior to denying any application for approval of construction or modification pursuant to this section, the Administrator will notify the owner or operator making such application of the Administrator's intention to issue such denial, together with:

(1) Notice of the information and findings on which such intended denial is based, and

(2) Notice of opportunity for such owner or operator to present, within such time limit as the Administrator shall specify, additional information or arguments to the Administrator prior to final action on such application.

(d) A final determination to deny any application for approval will be in writing and will set forth the specific grounds on which such denial is based. Such final determination will be made within 60 days of presentation of additional information or arguments, or 60 days after the final date specified for presentation, if no presentation is made.

(e) Neither the submission of an application for approval nor the Administrator's granting of approval to construct or modify shall:

(1) Relieve an owner or operator of legal responsibility for compliance with any applicable provision of this part or of any other applicable Federal, State, or local requirement, or

(2) Prevent the Administrator from implementing or enforcing this part or taking any other action under the act.

§ 61.09 Notification of startup.

(a) Any owner or operator of a source which has an initial startup after the effective date of a standard prescribed under this part shall furnish the Administrator written notification as follows:

(1) A notification of the anticipated date of initial startup of the source not more than 60 days nor less than 30 days prior to such date.

(2) A notification of the actual date of initial startup of the source within 15 days after such date.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.10 Source reporting and waiver request.

(a) The owner or operator of any existing source, or any new source to which a standard prescribed under this part is applicable which had an initial startup which preceded the effective date of a standard prescribed under this part shall, within 90 days after the effective date, provide the following information in writing to the Administrator:

(1) Name and address of the owner or operator.

(2) The location of the source.

(3) The type of hazardous pollutants emitted by the stationary source.

(4) A brief description of the nature, size, design, and method of operation of the stationary source including the operating design capacity of such source. Identify each point of emission for each hazardous pollutant.

(5) The average weight per month of the hazardous materials being processed by the source, over the last 12 months preceding the date of the report.

(6) A description of the existing control equipment for each emission point.

(i) Primary control device(s) for each hazardous pollutant.

(ii) Secondary control device(s) for each hazardous pollutant.

(iii) Estimated control efficiency (percent) for each control device.

(7) A statement by the owner or operator of the source as to whether he can comply with the standards prescribed in this part within 90 days of the effective date.

(b) The owner or operator of an existing source unable to operate in compliance with any standard prescribed under this part may request a waiver of compliance with such standard for a period not exceeding 2 years from the effective date. Any request shall be in writing and shall include the following information:

(1) A description of the controls to be installed to comply with the standard.

(2) A compliance schedule, including the date each step toward compliance will be reached. Such list shall include as a minimum the following dates:

(i) Date by which contracts for emission control systems or process modifications will be awarded, or date by which orders will be issued for the purchase of component parts to accomplish emission control or process modification;

(ii) Date of initiation of onsite construction or installation of emission control equipment or process change;

(iii) Date by which onsite construction or installation of emission control equipment or process modification is to be completed; and

(iv) Date by which final compliance is to be achieved.

(3) A description of interim emission control steps which will be taken during the waiver period.

(c) Changes in the information provided under paragraph (a) of this section shall be provided to the Administrator within 30 days after such change, except that if changes will result from modification of the source, as defined in § 61.02(j), the provisions of § 61.07 and § 61.08 are applicable.

(d) The format for reporting under this section is included as Appendix A of this part. Advice on reporting the status of compliance may be obtained from the Administrator.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.11 Waiver of compliance.

(a) Based on the information provided in any request under § 61.10, or other information, the Administrator may grant a waiver of compliance with a standard for a period not exceeding 2 years from the effective date of such standard.

(b) Such waiver will be in writing and will:

(1) Identify the stationary source covered.

(2) Specify the termination date of the waiver. The waiver may be terminated at an earlier date if the conditions specified under paragraph (b)(3) of this section are not met.

(3) Specify dates by which steps toward compliance are to be taken; and impose such additional conditions as the Administrator determines to be necessary to assure installation of the necessary controls within the waiver period, and to assure protection of the health of persons during the waiver period.

(c) Prior to denying any request for a waiver pursuant to this section, the Administrator will notify the owner or operator making such request of the Administrator's intention to issue such denial, together with:

(1) Notice of the information and findings on which such intended denial is based, and

(2) Notice of opportunity for such owner or operator to present, within such time limit as the Administrator specifies, additional information or arguments to the Administrator prior to final action on such request.

(d) A final determination to deny any request for a waiver will be in writing and will set forth the specific grounds on which such denial is based. Such final determination will be made within 60 days after presentation of additional information or arguments, or 60 days after the final date specified for such presentation, if no presentation is made.

(e) The granting of a waiver under this section shall not abrogate the Administrator's authority under section 114 of the act.

§ 61.12 Emission tests and monitoring.

(a) Emission tests and monitoring shall be conducted and reported as set forth in this part and Appendix B to this part.

(b) The owner or operator of a new source subject to this part, and at the request of the Administrator, the owner or operator of an existing source subject to this part, shall provide or cause to be provided, emission testing facilities as follows:

(1) Sampling ports adequate for test methods applicable to such source.

(2) Safe sampling platform(s).

(3) Safe access to sampling platform(s).

(4) Utilities for sampling and testing equipment.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.13 Waiver of emission tests.

(a) Emission tests may be waived upon written application to the Administrator if, in his judgment, the source is meeting the standard, or if the source is operating under a waiver of compliance or has requested a waiver of compliance.

(b) If application for waiver of the emission test is made, such application shall accompany the information required by § 61.10. The appropriate form is contained in Appendix A to this part.

(c) Approval of any waiver granted pursuant to this section shall not abrogate the Administrator's authority under the act or in any way prohibit the Administrator from later canceling such waiver. Such cancellation will be made only after notice is given to the owner or operator of the source.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.14 Source test and analytical methods.

(a) Methods 101, 102, and 104 in Appendix B to this part shall be used for all source tests required under this part, unless an equivalent method or an alternative method has been approved by the Administrator.

(b) Method 103 in Appendix B to this part is hereby approved by the Administrator as an alternative method for sources subject to § 61.32(a) and § 61.42(b).

(c) The Administrator may, after notice to the owner or operator, withdraw approval of an alternative method granted under paragraphs (a), (b) or (d) of this section. Where the test results using an alternative method do not adequately indicate whether a source is in compliance with a standard, the Administrator may require the use of the reference method or its equivalent.

(d) Method 105 in Appendix B to this part is hereby approved by the Administrator as an alternative method for sources subject to § 61.52(b).

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 40 FR 48299, Oct. 14, 1975; 43 FR 8800, Mar. 3, 1978]

§ 61.15 Availability of information.

The availability to the public of information provided to, or otherwise obtained by, the Administrator under this part shall be governed by Part 2 of this chapter.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[41 FR 36918, Sept. 1, 1976, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.16 State authority.

(a) The provisions of this part shall not be construed in any manner to preclude any State or political subdivision thereof from:

(1) Adopting and enforcing any emission limiting regulation applicable to a stationary source, provided that such emission limiting regulation is not less stringent than the standards prescribed under this part.

(2) Requiring the owner or operator of a stationary source, other than a stationary source owned or operated by the United States, to obtain permits, licenses, or approvals prior to initiating construction, modification, or operation of such source.

(Sec. 116, Clean Air Act as amended (42 U.S.C. 7416))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.17 Circumvention.

No owner or operator subject to the provisions of this part shall build, erect, install, or use any article machine, equipment, process, or method, the use of which conceals an emission which would otherwise constitute a violation of an applicable standard. Such concealment includes, but is not limited to, the use of gaseous dilutants to achieve compliance with a visible emissions standard, and the piecemeal carrying out of an operation to avoid coverage by a standard that applies only to operations larger than a specified size.

[40 FR 48299, Oct. 14, 1975]

Subpart B—National Emission Standard for Asbestos

§ 61.20 Applicability.

The provisions of this subpart are applicable to those sources specified in § 61.22.

§ 61.21 Definitions.

Terms used in this subpart are defined in the act, in Subpart A of this part, or in this section as follows:

(a) "Asbestos" means actinolite, amosite, anthophyllite, chrysotile, crocidolite, tremolite.

(b) "Asbestos material" means asbestos or any material containing asbestos.

(c) "Particulate asbestos material" means finely divided particles of asbestos material.

(d) "Asbestos tailings" means any solid waste product of asbestos mining or milling operations which contains asbestos.

(e) "Outside air" means the air outside buildings and structures.

(f) "Visible emissions" means any emissions which are visually detectable without the aid of instruments and which contain particulate asbestos material.

(g) "Asbestos mill" means any facility engaged in the conversion of any intermediate step in the conversion of asbestos or into commercial asbestos. Outside storage of asbestos materials is not considered a part of such facility.

(h) "Commercial asbestos" means any variety of asbestos which is produced by extracting asbestos from asbestos ore.

(i) "Manufacturing" means the combining of commercial asbestos, or in the case of woven friction products the combining of textiles containing commercial asbestos, with any other material(s), including commercial asbestos, and the processing of this combination into a product as specified in § 61.22(c).

(j) "Demolition" means the wrecking or taking out of any load-supporting structural member and any related removing or stripping of friable asbestos materials.

(k) "Friable asbestos material" means any material that contains more than 1 percent asbestos by weight and that can be crumbled, pulverized, or reduced to powder, when dry, by hand pressure.

(l) "Control device asbestos waste" means any asbestos-containing waste material that is collected in a pollution control device.

(m) "Renovation" means the removing or stripping of friable asbestos material used on any pipe, duct, boiler, tank, reactor, turbine, furnace, or structural member. Operations in which load-supporting structural members are wrecked or taken out are excluded.

(n) "Planned renovation" means a renovation operation, or a number of such operations, in which the amount of friable asbestos material that will be removed or stripped within a given period of time can be predicted. Operations that are individually non-scheduled are included, provided a number of such operations can be predicted to occur during a given period of time based on operating experience.

(o) "Emergency renovation" means a renovation operation that results from a sudden, unexpected event, and is not a planned renovation. Operations necessitated by non-routine failures of equipment are included.

(p) "Adequately wetted" means sufficiently mixed or coated with water or an aqueous solution to prevent dust emissions.

(q) "Removing" means taking out friable asbestos materials used on any pipe, duct, boiler, tank, reactor, turbine, furnace, or structural member from any building, structure, facility, or installation.

(r) "Stripping" means taking off friable asbestos materials from any pipe, duct, boiler, tank, reactor, turbine, furnace, or structural member.

(s) "Fabricating" means any processing of a manufactured product containing commercial asbestos, with the exception of processing at temporary sites for the construction or restoration of buildings, structures, facilities or installations.

(t) "Inactive waste disposal site" means any disposal site or portion thereof where additional asbestos-containing waste material will not be deposited and where the surface is not disturbed by vehicular traffic.

(u) "Active waste disposal site" means any disposal site other than an inactive site.

(v) "Roadways" means surfaces on which motor vehicles travel including, but not limited to, highways, roads, streets, parking areas, and driveways.

(w) "Asbestos-containing waste material" means any waste which contains commercial asbestos and is generated by a source subject to the provisions of this subpart, including asbestos mill tailings, control device asbestos waste, friable asbestos waste material, and bags or containers that previously contained commercial asbestos.

(x) "Structural member" means any load-supporting member, such as beams and load-supporting walls; or any non-load-supporting member, such as ceilings and non-load-supporting walls.

[38 FR 8826, Apr. 6, 1973, as amended at 39 FR 15398, May 3, 1974; 40 FR 48299, Oct. 14, 1975; 42 FR 12127, Mar. 2, 1977; 43 FR 26373, June 19, 1978]

§ 61.22 Emission standard.

(a) Asbestos mills: There shall be no visible emissions to the outside air from any asbestos mill except as provided in paragraph (f) of this section.

(b) Roadways: The surfacing of roadways with asbestos tailings or with asbestos-containing waste that is generated by any source subject to paragraphs (c), (d), (e) or (h) of this section is prohibited, except for temporary roadways on an area of asbestos ore deposits. The deposition of asbestos tailings or asbestos-containing waste on roadways covered with snow or ice is considered "surfacing."

(c) Manufacturing: There shall be no visible emissions to the outside air, except as provided in paragraph (f) of this section, from any of the following operations if they use commercial asbestos or from any building or structure in which such operations are conducted.

(1) The manufacture of cloth, cord, wicks, tubing, tape, twine, rope, thread, yarn, roving, lap, or other textile materials.

(2) The manufacture of cement products.

(3) The manufacture of fireproofing and insulating materials.

(4) The manufacture of friction products.

(5) The manufacture of paper, millboard, and felt.

(6) The manufacture of floor tile.

(7) The manufacture of paints, coatings, caulks, adhesives, sealants.

(8) The manufacture of plastics and rubber materials.

(9) The manufacture of chlorine.

(10) The manufacture of shotgun shells.

(11) The manufacture of asphalt concrete.

(d) Demolition and renovation: The requirements of this paragraph shall apply to any owner or operator of a demolition or renovation operation who intends to demolish any institutional, commercial, or industrial building (including apartment buildings having more than four dwelling units), structure, facility, installation, or portion thereof, which contains any pipe, duct, boiler, tank, reactor, turbine, furnace, or structural member that is covered or coated with friable asbestos material, except as provided in paragraph (d)(1) of this section; or who intends to renovate any institutional, commercial, or industrial building, structure, facility, installation, or portion thereof where more than 80 meters (ca. 260 feet) of pipe covered or coated with friable asbestos material are stripped or removed, or more than 15 square meters (ca. 160 square feet) of friable asbestos material used to cover or coat any duct, boiler, tank, reactor, turbine, furnace, or structural member are stripped or removed.

(1)(i) The owner or operator of a demolition operation is exempted from the requirements of this paragraph: *Provided,* (A) the amount of friable asbestos material in the building or portion thereof to be demolished is less than 80 meters (ca. 260 feet) used to insulate pipes, and less than 15 square meters (ca. 160 square feet) used to insulate or fireproof any duct, boiler, tank, reactor, turbine, furnace, or structural member, and (B) the notification requirements of paragraph (d)(1)(ii) are met.

(ii) Written notification shall be postmarked or delivered to the Administrator at least 20 days prior to commencement of demolition and shall include the information required by paragraph (d)(2) of this section, with the exception of the information required by paragraphs (d)(2)(iii), (vi), (vii), (viii), and (ix), and shall state the measured or estimated amount of friable asbestos materials which is present. Techniques of estimation shall be explained.

(2) Written notice of intention to demolish or renovate shall be provided to the Administrator by the owner or operator of the demolition or renovation operation. Such notice shall be postmarked or delivered to the Administrator at least 10 days prior to commencement of demolition, or as early as possible prior to commencement of emergency demolition subject to paragraph (d)(6) of this section, and as early as possible prior to commencement of renovation. Such notice shall include the following information:

(i) Name of owner or operator.

(ii) Address of owner or operator.

(iii) Description of the building, structure, facility, or installation to be demolished or renovated, including the size, age, and prior use of the structure, and the approximate amount of friable asbestos materials present.

(iv) Address or location of the building, structure, facility, or installation.

(v) Scheduled starting and completion dates of demolition or renovation.

(vi) Nature of planned demolition or renovation and method(s) to be employed.

(vii) Procedures to be employed to meet the requirements of this paragraph and paragraph (j) of this section.

(viii) The name and address or location of the waste disposal site where the friable asbestos waste will be deposited.

(ix) Name, title, and authority of the State or local governmental representative who has ordered a demolition which is subject to paragraph (d)(6) of this section.

(3)(i) For purposes of determining whether a planned renovating operation constitutes a renovation within the meaning of this paragraph, the amount of friable asbestos material to be removed or stripped shall be:

(A) For planned renovating operations involving individually nonscheduled operations, the additive amount of friable asbestos material that can be predicted will be removed or stripped at a source over the maximum period of time for which a prediction can be made. The period shall be not less than 30 days and not longer than one year.

(B) For each planned renovating operation not covered by paragraph (d)(3)(i)(A), the total amount of friable asbestos material that can be predicted will be removed or stripped at a source.

(ii) For purposes of determining whether an emergency renovating operation constitutes a renovation within the meaning of this paragraph, the amount of friable asbestos material to be removed or stripped shall be the total amount of friable asbestos material that will be removed or stripped as a result of the sudden, unexpected event that necessitated the renovation.

(4) The following procedures shall be used to prevent emissions of particulate asbestos material to outside air:

(i) Friable asbestos materials, used on any pipe, duct, boiler, tank, reactor, turbine, furnace, or structural member, shall be removed from any building, structure, facility or installation subject to this paragraph. Such removal shall occur before wrecking or dismantling of any portion of such building, structure, facility, or installation that would break up the friable asbestos materials and before wrecking or dismantling of any other portion of such building, structure, facility, or installation that would preclude access to such materials for subsequent removal. Removal of friable asbestos materials used on any pipe, duct, or structural member which are encased in concrete or other similar structural material is not required prior to demolition, but such material shall be adequately wetted whenever exposed during demolition.

(ii) Friable asbestos materials used on pipes, ducts, boilers, tanks, reactors, turbines, furnaces, or structural members shall be adequately wetted during stripping, except as provided in paragraphs (d)(4)(iv), (d)(4)(vi) or (d)(4)(vii) of this section.

(iii) Pipes, ducts, boilers, tanks, reactors, turbines, furnaces, or structural members that are covered or coated with friable asbestos materials may be taken out of any building, structure, facility, or installation subject to this paragraph as units or in sections provided the friable asbestos materials exposed during cutting or disjointing are adequately wetted during the cutting or disjointing operation. Such units shall not be dropped or thrown to the ground, but shall be carefully lowered to ground level.

(iv) The stripping of friable asbestos materials used on any pipe, duct, boiler, tank, reactor, turbine, furnace, or structural member that has been removed as a unit or in sections as provided in paragraph (d)(4)(iii) of this section shall be performed in accordance with paragraph (d)(4)(ii) of this section. Rather than comply with the wetting requirement, a local exhaust ventilation and collection system may be used to prevent emissions to the outside air. Such local exhaust ventilation systems shall be designed and operated to capture the asbestos particulate matter produced by the stripping of friable asbestos material. There shall be no visible emissions to the outside air from such local exhaust ventilation and collection systems except as provided in paragraph (f) of this section.

(v) All friable asbestos materials that have been removed or stripped shall be adequately wetted to ensure that such materials remain wet during all remaining stages of demolition or renovation and related handling operations. Such materials shall not be dropped or thrown to the ground or a lower floor. Such materials that have been removed or stripped more than 50 feet above ground level, except those materials removed as units or in sections, shall be transported to the ground via dust-tight chutes or containers.

(vi) Except as specified below, the wetting requirements of this paragraph are suspended when the temperature at the point of wetting is below 0°C (32°F). When friable asbestos materials are not wetted due to freezing temperatures, such materials on pipes, ducts, boilers, tanks, reactors, turbines, furnaces, or structural members shall, to the maximum extent possible, be removed as units or in sections prior to wrecking. In no case shall the requirements of paragraphs (d)(4)(iv) or (d)(4)(v) be suspended due to freezing temperatures.

(vii) For renovation operations, local exhaust ventilation and collection systems may be used, instead of wetting as specified in paragraph (d)(4)(ii), to prevent emissions of particulate asbestos material to outside air when damage to equipment resulting from the wetting would be unavoidable. Upon request and supply of adequate information, the Administrator will determine whether damage to equipment resulting from wetting to comply with the provisions of this paragraph would be unavoidable. Such local exhaust ventilation systems shall be designed and operated to capture the asbestos particulate matter produced by the stripping and removal of friable asbestos material. There shall be no visible emissions to the outside air from such local exhaust ventilation and collection systems, except as provided in paragraph (f) of this section.

(5) Sources subject to this paragraph are exempt from the requirements of §§ 61.05(a), 61.07, and 61.09.

(6) The demolition of a building, structure, facility, or installation, pursuant to an order of an authorized representative of a State or local governmental agency, issued because that building is structurally unsound and in danger of imminent collapse is exempt from all but the following requirements of paragraph (d) of this section:

(i) The notification requirements specified by paragraph (d)(2) of this section;

(ii) The requirements on stripping of friable asbestos materials from previously removed units or sections as specified in paragraph (d)(4)(iv) of this section;

(iii) The wetting, as specified by paragraph (d)(4)(v) of this section, of friable asbestos materials that have been removed or stripped;

(iv) The portion of the structure being demolished that contains friable asbestos materials shall be adequately wetted during the wrecking operation.

(e) Spraying: There shall be no visible emissions to the outside air from the spray-on application of materials containing more than 1 percent asbestos, on a dry weight basis, used on equipment and machinery, except as provided in paragraph (f) of this section. Materials sprayed on buildings, structures, pipes, and conduits shall contain less than 1 percent asbestos on a dry weight basis.

(1) Sources subject to this paragraph are exempt from the requirements of § 61.05(a), § 61.07, and § 61.09.

(2) Any owner or operator who intends to spray asbestos materials which contain more than 1 percent asbestos on a dry weight basis to insulate or fireproof equipment and machinery shall report such intention to the Administrator at least 20 days prior to the commencement of the spraying operation. Such report shall include the following information:

(i) Name of owner or operator.

(ii) Address of owner or operator.

(iii) Location of spraying operation.

(iv) Procedures to be followed to meet the requirements of this paragraph.

(3) The spray-on application of materials in which the asbestos fibers are encapsulated with a bituminous or resinous binder during spraying and which are no friable after drying is exempted from the requirements of paragraphs (e) and (e)(2) of this section.

(f) Rather than meet the no-visible-emission requirements as specified by paragraphs (a), (c), (d), (e), (h), (j), and (k) of this section, an owner or operator may elect to use the methods specified by § 61.23 to clean emissions containing particulate asbestos material before such emissions escape to, or are vented to, the outside air.

(g) Where the presence of uncombined water is the sole reason for failure to meet the no-visible-emission requirement of paragraphs (a), (c), (d), (e), (h), (j), or (k) of this section, such failure shall not be a violation of such emission requirements.

(h) Fabricating: There shall be no visible emissions to the outside air, except as provided in paragraph (f) of this section, from any of the following operations if they use commercial asbestos or from any building or structure in which such operations are conducted.

(1) The fabrication of cement building products.

(2) The fabrication of friction products, except those operations that primarily install asbestos friction materials on motor vehicles.

(3) The fabrication of cement or silicate board for ventilation hoods; ovens; electrical panels; laboratory furniture; bulkheads, partitions and ceilings for marine construction; and flow control devices for the molten metal industry.

(i) Insulating: Molded insulating materials which are friable and wet-applied insulating materials which are friable after drying, installed after the effective date of these regulations, shall contain no commercial asbestos. The provisions of this paragraph do not apply to insulating materials which are spray applied; such materials are regulated under § 61.22(e).

(j) Waste disposal for manufacturing, fabricating, demolition, renovation and spraying operations: The owner or operator of any source covered under the provisions of paragraphs (c), (d), (e), or (h) of this section shall meet the following standards:

(1) There shall be no visible emissions to the outside air, except as provided in paragraph (j)(3) of this section, during the collection; processing, including incineration; packaging; transporting; or deposition of any asbestos-containing waste material which is generated by such source.

(2) All asbestos-containing waste material shall be deposited at waste disposal sites which are operated in accordance with the provisions of § 61.25.

(3) Rather than meet the requirement of paragraph (j)(1) of this section, an owner or operator may elect to use either of the disposal methods specified under (j)(3) (i) and (ii) of this section, or an alternative disposal method which has received prior approval by the Administrator:

(i) Treatment of asbestos-containing waste material with water:

(A) Control device asbestos waste shall be thoroughly mixed with water into a slurry and other asbestos-containing waste material shall be adequately wetted. There shall be no visible emissions to the outside air from the collection, mixing and wetting operations, except as provided in paragraph (f) of this section.

(B) After wetting, all asbestos-containing waste material shall be sealed into leak-tight containers while wet, and such containers shall be deposited at waste disposal sites which are operated in accordance with the provisions of § 61.25.

(C) The containers specified under paragraph (j)(3)(i)(B) of this section shall be labeled with a warning label that states:

CAUTION

Contains Asbestos

Avoid Opening or

Breaking Container

Breathing Asbestos is Hazardous

to Your Health

Alternatively, warning labels specified by Occupational Safety and Health Standards of the Department of Labor, Occupational Safety and Health Administration (OSHA) under 29 CFR 1910.93a(g)(2)(ii) may be used.

(ii) Processing of asbestos-containing waste material into non-friable forms:

(A) All asbestos-containing waste material shall be formed into non-friable pellets or other shapes and deposited at waste disposal sites which are operated in accordance with the provisions of § 61.25.

(B) There shall be no visible emissions to the outside air from the collection and processing of asbestos-containing waste material, except as specified in paragraph (f) of this section.

(4) For the purposes of this paragraph (j), the term all asbestos-containing waste material as applied to demolition and renovation operations covered by paragraph (d) of this section includes only friable asbestos waste and control device asbestos waste.

(k) Waste disposal for asbestos mills: The owner or operator of any source covered under the provisions of paragraph (a) of this section shall meet the following standard:

(1) There shall be no visible emissions to the outside air, except as provided in paragraph (k)(3) of this section, during the collection, processing, packaging, transporting or deposition of any asbestos-containing waste material which is generated by such source.

(2) All asbestos-containing waste material shall be deposited at waste disposal sites which are operated in accordance with the provisions of § 61.25.

(3) Rather than meet the requirement of paragraph (k)(1) of this section, an owner or operator may elect to meet the following requirements in paragraphs (k)(3) (i) and (ii), or use an alternative disposal method which has received prior approval by the Administrator:

(i) There shall be no visible emissions to the outside air from the transfer of control device asbestos waste to the tailings conveyor, except as provided in paragraph (f) of this section. Such waste shall be subsequently processed either as specified in paragraph (k)(3)(ii) of this section or as specified in paragraph (j)(3) of this section.

(ii) All asbestos-containing waste material shall be adequately mixed, with a wetting agent recommended by the manufacturer of the agent to effectively wet dust and tailings, prior to deposition at a waste disposal site. Such agent shall be used as recommended for the particular dust by the manufacturer of the agent. There shall be no discharge of visible emissions to the outside air from the wetting operation except as specified in paragraph (f) of this section. Wetting may be suspended when the ambient temperature at the waste disposal site is less than −9.5° C (ca. 15° F). The ambient air temperature shall be determined by an appropriate measurement method with an accuracy of ±1° C (±2° F) and recorded at least at hourly intervals during the period that the operation of the wetting system is suspended. Records of such temperature measurements shall be retained at the source for a minimum of 2 years and made available for inspection by the Administrator.

(l) The owner of any inactive waste disposal site, which was operated by sources covered under § 61.22(a), (c) or (h) and where asbestos-containing waste material produced by such sources was deposited, shall meet the following standards:

(1) There shall be no visible emissions to the outside air from an inactive waste disposal site subject to this paragraph, except as provided in paragraph (l)(5) of this section.

(2) Warning signs shall be displayed at all entrances, and along the property line of the site or along the perimeter of the sections of the site where asbestos-containing waste material was deposited, at intervals of 100 m (ca. 330 ft) or less, except as specified in paragraph (l)(4) of this section. Signs shall be posted in such a manner and location that a person may easily read the legend. The warning signs required by this paragraph shall conform to the requirements of 20″ x 14″ upright format signs specified in 29 CFR 1910.145(d)(4) and this paragraph. The signs shall display the following legend in the lower panel, with letter sizes and styles of a visibility at least equal to those specified in this paragraph.

LEGEND

ASBESTOS WASTE DISPOSAL SITE

DO NOT CREATE DUST

Breathing Asbestos is Hazardous to Your Health

Notation

1″ Sans Serif, Gothic or Block

¾″ Sans Serif, Gothic or Block

14 Point Gothic

Spacing between lines shall be at least equal to the height of the upper of the two lines.

(3) The perimeter of the site shall be fenced in a manner adequate to deter access by the general public, except as specified in paragraph (l)(4) of this section.

(4) Warning signs and fencing are not required where the requirements of paragraphs (l)(5) (i) or (ii) of this section are met, or where a natural

barrier adequately deters access by the general public. Upon request and supply of appropriate information, the Administrator will determine whether a fence or a natural barrier adequately deters access to the general public.

(5) Rather than meet the requirement of paragraph (1)(l) of this section, an owner may elect to meet the requirements of this paragraph or may use an alternative control method for emissions from inactive waste disposal sites which has received prior approval by the Administrator.

(i) The asbestos-containing waste material shall be covered with at least 15 centimeters (ca. 6 inches) of compacted non-asbestos-containing material, and a cover of vegetation shall be grown and maintained on the area adequate to prevent exposure of the asbestos-containing waste material; or

(ii) The asbestos-containing waste material shall be covered with at least 60 centimeters (ca. 2 feet) of compacted non-asbestos-containing material and maintained to prevent exposure of the asbestos-containing waste; or

(iii) For inactive waste disposal sites for asbestos tailings, a resinous or petroleum-based dust suppression agent which effectively binds dust and controls wind erosion shall be applied. Such agent shall be used as recommended for the particular asbestos tailings by the dust suppression agent manufacturer. Other equally effective dust suppression agents may be used upon prior approval by the Administrator. For purposes of this paragraph, waste crankcase oil is not considered a dust suppression agent.

[38 FR 8826, Apr. 6, 1973, as amended at 39 FR 15398, May 3, 1974; 40 FR 48299, Oct. 14, 1975; 43 FR 26374, June 19, 1978]

§ 61.23 Air-cleaning.

If air-cleaning is elected, as permitted by §§ 61.22(f) and 61.22(d)(4)(iv), the requirements of this section must be met.

(a) Fabric filter collection devices must be used, except as noted in paragraphs (b) and (c) of this section. Such devices must be operated at a pressure drop of no more than 4 inches water gage, as measured across the filter fabric. The airflow permeability, as determined by ASTM method D737-69, must not exceed 30 $ft^3/min/ft^2$ for woven fabrics or 35 $ft^3/min/ft^2$ for felted fabrics, except that 40 $ft^3/min/ft^2$ for woven and 45 $ft^3/min/ft^2$ for felted fabrics is allowed for filtering air from asbestos ore dryers. Each square yard of felted fabric must weigh at least 14 ounces and be at least one-sixteenth inch thick throughout. Synthetic fabrics must not contain fill yarn other than that which is spun.

(b) If the use of fabric filters creates a fire or explosion hazard, the administrator may authorize the use of wet collectors designed to operate with a unit contacting energy of at least 40 inches water gage pressure.

(c) The administrator may authorize the use of filtering equipment other than that described in paragraphs (a) and (b) of this section if the owner or operator demonstrates to the satisfaction of the administrator that the filtering of particulate asbestos material is equivalent to that of the described equipment.

(d) All air-cleaning equipment authorized by this section must be properly installed, used, operated, and maintained. Bypass devices may be used only during upset or emergency conditions and then only for so long as it takes to shut down the operation generating the particulate asbestos material.

[38 FR 8826, Apr. 6, 1973, as amended at 40 FR 48302, Oct. 14, 1975]

§ 61.24 Reporting.

The owner or operator of any existing source to which this subpart is applicable shall, within 90 days after the effective date, provide the following information to the administrator:

(a) A description of the emission control equipment used for each process;

(b) If a fabric filter device is used to control emissions, the pressure drop across the fabric filter in inches water gage.

(1) If the fabric filter device utilizes a woven fabric, the airflow permeability in $ft^3/min/ft^2$ and, if the fabric is synthetic, indicate whether the fill yarn is spun or not spun.

(2) If the fabric filter device utilizes a felted fabric, the density in oz/yd^2,

the minimum thickness in inches, and the airflow permeability in $ft^3/min/ft^2$.

(c) For sources subject to §§ 61.22(j) and 61.22(k):

(1) A brief description of each process that generates asbestos-containing waste material.

(2) The average weight of asbestos-containing waste material disposed of, measured in kg/day.

(3) The emission control methods used in all stages of waste disposal.

(4) The type of disposal site or incineration site used for ultimate disposal, the name of the site operator, and the name and location of the disposal site.

(d) For sources subject to § 61.22(l):

(1) A brief description of the site.

(2) The method or methods used to comply with the standard, or alternative procedures to be used.

(e) Such information shall accompany the information required by § 61.10. The information described in this section shall be reported using the format of Appendix A of this part.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 40 FR 48302, Oct. 14, 1975; 43 FR 8800, Mar. 3, 1978]

§ 61.25 Waste disposal sites.

In order to be an acceptable site for disposal of asbestos-containing waste material under § 61.22(j) and (k), an active waste disposal site shall meet the requirements of this section.

(a) There shall be no visible emissions to the outside air from any active waste disposal site where asbestos-containing waste material has been deposited, except as provided in paragraph (e) of this section.

(b) Warning signs shall be displayed at all entrances, and along the property line of the site or along the perimeter of the sections of the site where asbestos-containing waste material is deposited, at intervals of 100 m (ca. 330 ft) or less except as specified in paragraph (d) of this section. Signs shall be posted in such a manner and location that a person may easily read the legend. The warning signs required by this paragraph shall conform to the requirements of 20" × 14" upright format signs specified in 29 CFR 1910.145(d)(4) and this paragraph. The signs shall display the following legend in the lower panel, with letter sizes and styles of a visibility at least equal to those specified in this paragraph.

LEGEND	Notation
ASBESTOS WASTE DISPOSAL SITE	1" Sans Serif Gothic or Block
Do Not Create Dust	¾" Sans Serif, Gothic or Block
Breathing Asbestos is Hazardous to Your Health	14 Point Gothic

Spacing between lines shall be at least equal to the height of the upper of the two lines.

(c) The perimeter of the disposal site shall be fenced in order to adequately deter access to the general public except as specified in paragraph (d) of this section.

(d) Warning signs and fencing are not required where the requirements of paragraph (e)(1) of this section are met, or where a natural barrier adequately deters access to the general public. Upon request and supply of appropriate information, the Administrator will determine whether a fence or a natural barrier adequately deters access to the general public.

(e) Rather than meet the requirement of paragraph (a) of this section, an owner or operator may elect to meet the requirements of paragraph (e)(1) or (e)(2) of this section, or may use an alternative control method for emissions from active waste disposal sites which has received prior approval by the Administrator.

(1) At the end of each operating day, or at least once every 24-hour period while the site is in continuous operation, the asbestos-containing waste material which was deposited at the site during the operating day or previous 24-hour period shall be covered with at least 15 centimeters (ca. 6 inches) of compacted non-asbestos-containing material.

(2) At the end of each operating day, or at least once every 24-hour period while the disposal site is in continuous

operation, the asbestos-containing waste material which was deposited at the site during the operating day or previous 24-hour period shall be covered with a resinous or petroleum-based dust suppression agent which effectively binds dust and controls wind erosion. Such agent shall be used as recommended for the particular dust by the dust suppression agent manufacturer. Other equally effective dust suppression agents may be used upon prior approval by the Administrator. For purposes of this paragraph, waste crankcase oil is not considered a dust suppression agent.

[40 FR 48302, Oct. 14, 1975]

Subpart C—National Emission Standard for Beryllium

§ 61.30 Applicability.

The provisions of this subpart are applicable to the following stationary sources:

(a) Extraction plans, ceramic plants, foundries, incinerators, and propellant plants which process beryllium ore, beryllium, beryllium oxide, beryllium alloys, or beryllium-containing waste.

(b) Machine shops which process beryllium, beryllium oxides, or any alloy when such alloy contains more than 5 percent beryllium by weight.

§ 61.31 Definitions.

Terms used in this subpart are defined in the act, in subpart A of this part, or in this section as follows:

(a) "Beryllium" means the element beryllium. Where weights or concentrations are specified, such weights or concentrations apply to beryllium only, excluding the weight or concentration of any associated elements.

(b) "Extraction plant" means a facility chemically processing beryllium ore to beryllium metal, alloy, or oxide, or performing any of the intermediate steps in these processes.

(c) "Beryllium ore" means any naturally occurring material mined or gathered for its beryllium content.

(d) "Machine shop" means a facility performing cutting, grinding, turning, honing, milling, deburring, lapping, electrochemical machining, etching, or other similar operations.

(e) "Ceramic plant" means a manufacturing plant producing ceramic items.

(f) "Foundry" means a facility engaged in the melting or casting of beryllium metal or alloy.

(g) "Beryllium-containing waste" means material contaminated with beryllium and/or beryllium compounds used or generated during any process or operation performed by a source subject to this subpart.

(h) "Incinerator" means any furnace used in the process of burning waste for the primary purpose of reducing the volume of the waste by removing combustible matter.

(i) "Propellant" means a fuel and oxidizer physically or chemically combined which undergoes combustion to provide rocket propulsion.

(j) "Beryllium alloy" means any metal to which beryllium has been added in order to increase its beryllium content and which contains more than 0.1 percent beryllium by weight.

(k) "Propellant plant" means any facility engaged in the mixing, casting, or machining of propellant.

§ 61.32 Emission standard.

(a) Emissions to the atmosphere from stationary sources subject to the provisions of this subpart shall not exceed 10 grams of beryllium over a 24-hour period, except as provided in paragraph (b) of this section.

(b) Rather than meet the requirement of paragraph (a) of this section, an owner or operator may request approval from the Administrator to meet an ambient concentration limit on beryllium in the vicinity of the stationary source of 0.01 $\mu g/m^3$, averaged over a 30-day period.

(1) Approval of such requests may be granted by the Administrator provided that:

(i) At least 3 years of data is available which in the judgment of the Administrator demonstrates that the future ambient concentrations of beryllium in the vicinity of the stationary source will not exceed 0.01 $\mu g/m^3$, averaged over a 30-day period. Such 3-year period shall be the 3 years ending 30 days before the effective date of this standard.

(ii) The owner or operator requests such approval in writing within 30 days after the effective date of this standard.

(iii) The owner or operator submits a report to the Administrator within 45 days after the effective date of this standard which report includes the following information:

(*a*) Description of sampling method including the method and frequency of calibration.

(*b*) Method of sample analysis.

(*c*) Averaging technique for determining 30-day average concentrations.

(*d*) Number, identity, and location (address, coordinates, or distance and heading from plant) of sampling sites.

(*e*) Ground elevations and height above ground of sampling inlets.

(*f*) Plant and sampling area plots showing emission points and sampling sites. Topographic features significantly affecting dispersion including plant building heights and locations shall be included.

(*g*) Information necessary for estimating dispersion including stack height, inside diameter, exit gas temperature, exit velocity or flow rate, and beryllium concentration.

(*h*) A description of data and procedures (methods or models) used to design the air sampling network (i.e., number and location of sampling sites).

(*i*) Air sampling data indicating beryllium concentrations in the vicinity of the stationary source for the 3-year period specified in paragraph (b)(1) of this section. This data shall be presented chronologically and include the beryllium concentration and location of each individual sample taken by the network and the corresponding 30-day average beryllium concentrations.

(2) Within 60 days after receiving such report, the Administrator will notify the owner or operator in writing whether approval is granted or denied. Prior to denying approval to comply with the provisions of paragraph (b) of this section, the Administrator will consult with representatives of the statutory source for which the demonstration report was submitted.

(c) The burning of beryllium and/or beryllium-containing waste, except propellants, is prohibited except in incinerators, emissions from which must comply with the standard.

§ 61.33 Stack sampling.

(a) Unless a waiver of emission testing is obtained under § 61.13, each owner or operator required to comply with § 61.32(a) shall test emissions from his source,

(1) Within 90 days of the effective date in the case of an existing source or a new source which has an initial startup date preceding the effective date; or

(2) Within 90 days of startup in the case of a new source which did not have an initial startup date preceding the effective date.

(b) The Administrator shall be notified at least 30 days prior to an emission test so that he may at his option observe the test.

(c) Samples shall be taken over such a period or periods as are necessary to accurately determine the maximum emissions which will occur in any 24-hour period. Where emissions depend upon the relative frequency of operation of different types of processes, operating hours, operating capacities, or other factors, the calculation of maximum 24-hour-period emissions will be based on that combination of factors which is likely to occur during the subject period and which result in the maximum emissions. No changes in the operation shall be made, which would potentially increase emissions above that determined by the most recent source test, until a new emission level has been estimated by calculation and the results reported to the Administrator.

(d) All samples shall be analyzed and beryllium emissions shall be determined within 30 days after the source test. All determinations shall be reported to the Administrator by a registered letter dispatched before the close of the next business day following such determination.

(e) Records of emission test results and other data needed to determine total emissions shall be retained at the source and made available, for inspection by the Administrator, for a minimum of 2 years.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.34 Air sampling.

(a) Stationary sources subject to § 61.32(b) shall locate air sampling sites in accordance with a plan approved by the Administrator. Such sites shall be located in such a manner as is calculated to detect maximum concentrations of beryllium in the ambient air.

(b) All monitoring sites shall be operated continuously except for a reasonable time allowance for instrument maintenance and calibration, for changing filters, or for replacement of equipment needing major repair.

(c) Filters shall be analyzed and concentrations calculated within 30 days after filters are collected. Records of concentrations at all sampling sites and other data needed to determine such concentrations shall be retained at the source and made available, for inspection by the Administrator, for a minimum of 2 years.

(d) Concentrations measured at all sampling sites shall be reported to the Administrator every 30 days by a registered letter.

(e) The Administrator may at any time require changes in, or expansion of, the sampling network.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

Subpart D—National Emission Standard for Beryllium Rocket Motor Firing

§ 61.40 Applicability.

The provisions of this subpart are applicable to rocket motor test sites.

§ 61.41 Definitions.

Terms used in this subpart are defined in the Act, in Subpart A of this part, or in this section as follows:

(a) "Rocket motor test site" means any building, structure, facility, or installation where the static test firing of a beryllium rocket motor and/or the disposal of beryllium propellant is conducted.

(b) "Beryllium propellant" means any propellant incorporating beryllium.

§ 61.42 Emission standard.

(a) Emissions to the atmosphere from rocket-motor test sites shall not cause time-weighted atmospheric concentrations of beryllium to exceed 75 microgram minutes per cubic meter of air within the limits of 10 to 60 minutes, accumulated during any 2 consecutive weeks, in any area in which an effect adverse to public health could occur.

(b) If combustion products from the firing of beryllium propellant are collected in a closed tank, emissions from such tank shall not exceed 2 grams per hour and a maximum of 10 grams per day.

§ 61.43 Emission testing—rocket firing or propellant disposal.

(a) Ambient air concentrations shall be measured during and after firing of a rocket motor or propellant disposal and in such a manner that the effect of these emissions can be compared with the standard. Such sampling techniques shall be approved by the Administrator.

(b) All samples shall be analyzed and results shall be calculated within 30 days after samples are taken and before any subsequent rocket motor firing or propellant disposal at the given site. All results shall be reported to the Administrator by a registered letter dispatched before the close of the next business day following determination of such results.

(c) Records of air sampling test results and other data needed to determine integrated intermittent concentrations shall be retained at the source and made available, for inspection by the Administrator, for a minimum of 2 years.

(d) The Administrator shall be notified at least 30 days prior to an air sampling test, so that he may at his option observe the test.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.44 Stack sampling.

(a) Sources subject to § 61.42(b) shall be continuously sampled, during release of combustion products from the tank, in such a manner that compliance with the standards can be determined. The provisions of § 61.14 shall apply.

(b) All samples shall be analyzed, and beryllium emissions shall be determined within 30 days after samples are taken and before any subsequent rocket motor firing or propellant disposal at the given site. All determinations shall be reported to the Administrator by a registered letter dispatched before the close of the next business day following such determinations.

(c) Records of emission test results and other data needed to determine total emissions shall be retained at the source and made available, for inspection by the Administrator, for a minimum of 2 years.

(d) The Administrator shall be notified at least 30 days prior to an emission test, so that he may at his option observe the test.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 43 FR 8800, Mar. 3, 1978]

Subpart E—National Emission Standard for Mercury

§ 61.50 Applicability.

The provisions of this subpart are applicable to those stationary sources which process mercury ore to recover mercury, use mercury chlor-alkali cells to produce chlorine gas and alkali metal hydroxide, and incinerate or dry wastewater treatment plant sludge.

[40 FR 48302, Oct. 14, 1975]

§ 61.51 Definitions.

Terms used in this subpart are defined in the act, in Subpart A of this part, or in this section as follows:

(a) "Mercury" means the element mercury, excluding any associated elements, and includes mercury in particulates, vapors, aerosols, and compounds.

(b) "Mercury ore" means a mineral mined specifically for its mercury content.

(c) "Mercury ore processing facility" means a facility processing mercury ore to obtain mercury.

(d) "Condenser stack gases" mean the gaseous effluent evolved from the stack of processes utilizing heat to extract mercury metal from mercury ore.

(e) "Mercury chlor-alkali cell" means a device which is basically composed of an electrolyzer section and a denuder (decomposer) section and utilizes mercury to produce chlorine gas, hydrogen gas, and alkali metal hydroxide.

(f) "Mercury chlor-alkali electrolyzer" means an electrolytic device which is part of a mercury chlor-alkali cell and utilizes a flowing mercury cathode to produce chlorine gas and alkali metal amalgam.

(g) "Denuder" means a horizontal or vertical container which is part of a mercury chlor-alkali cell and in which water and alkali metal amalgam are converted to alkali metal hydroxide, mercury, and hydrogen gas in a short-circuited, electrolytic reaction.

(h) "Hydrogen gas stream" means a hydrogen stream formed in the chlor-alkali cell denuder.

(i) "End box" means a container(s) located on one or both ends of a mercury chlor-alkali electrolyzer which serves as a connection between the electrolyzer and denuder for rich and stripped amalgam.

(j) "End box ventilation system" means a ventilation system which collects mercury emissions from the end-boxes, the mercury pump sumps, and their water collection systems.

(k) "Cell room" means a structure(s) housing one or more mercury electrolytic chlor-alkali cells.

(l) "Sludge" means sludge produced by a treatment plant that processes municipal or industrial waste waters.

(m) "Sludge dryer" means a device used to reduce the moisture content of sludge by heating to temperatures above 65°C (ca. 150°F) directly with combustion gases.

[38 FR 8826, Apr. 6, 1973, as amended at 40 FR 48302, Oct. 14, 1975]

§ 61.52 Emission standard.

(a) Emissions to the atmosphere from mercury ore processing facilities and mercury cell chlor-alkali plants shall not exceed 2300 grams of mercury per 24-hour period.

(b) Emissions to the atmosphere from sludge incineration plants, sludge drying plants, or a combination of these that process wastewater treatment plant sludges shall not exceed 3200 grams of mercury per 24-hour period.

[40 FR 48302, Oct. 14, 1975]

§ 61.53 Stack sampling.

(a) Mercury ore processing facility.

(1) Unless a waiver of emission testing is obtained under § 61.13, each owner or operator processing mercury ore shall test emissions from his source:

(i) Within 90 days of the effective date in the case of an existing source or a new source which has an initial start-up date preceding the effective date; or

(ii) Within 90 days of startup in the case of a new source which did not have an initial startup date preceding the effective date.

(2) The Administrator shall be notified at least 30 days prior to an emission test, so that he may at his option observe the test.

(3) Samples shall be taken over such a period or periods as are necessary to accurately determine the maximum emissions which will occur in a 24-hour period. No changes in the operation shall be made, which would potentially increase emissions above that determined by the most recent source test, until the new emission level has been estimated by calculation and the results reported to the Administrator.

(4) All samples shall be analyzed, and mercury emissions shall be determined within 30 days after the source test. Each determination will be reported to the Administrator by a registered letter dispatched before the close of the next business day following such determination.

(5) Records of emission test results and other data needed to determine total emissions shall be retained at the source and made available, for inspection by the Administrator, for a minimum of 2 years.

(b) Mercury chlor-alkali plant—hydrogen and end-box ventilation gas streams.

(1) Unless a waiver of emission testing is obtained under § 61.13, each owner or operator employing mercury chlor-alkali cell(s) shall test emissions from his source,

(i) Within 90 days of the effective date in the case of an existing source or a new source which has an initial startup date preceding the effective date; or

(ii) Within 90 days of startup in the case of a new source which did not have an initial startup date preceding the effective date.

(2) The Administrator shall be notified at least 30 days prior to an emission test, so that he may at his option observe the test.

(3) Samples shall be taken over such a period or periods as are necessary to accurately determine the maximum emissions which will occur in a 24-hour period. No changes in the operation shall be made, which would potentially increase emissions above that determined by the most recent source test, until the new emission has been estimated by calculation and the results reported to the Administrator.

(4) All samples shall be analyzed and mercury emissions shall be determined within 30 days after the source test. All the determinations will be reported to the Administrator by a registered letter dispatched before the close of the next business day following such determination.

(5) Records of emission test results and other data needed to determine total emissions shall be retained at the source and made available, for inspection by the Administrator, for a minimum of 2 years.

(c) Mercury chlor-alkali plants—cell room ventilation system.

(1) Stationary sources using mercury chlor-alkali cells may test cell room emissions in accordance with paragraph (c)(2) of this section or demonstrate compliance with paragraph (c)(4) of this section and assume ventilation emissions of 1,300 gms/day of mercury.

(2) Unless a waiver of emission testing is obtained under § 61.13, each owner or operator shall pass all cell room air in forced gas streams through stacks suitable for testing.

(i) Within 90 days of the effective date in the case of an existing source or a new source which has an initial startup date preceding the effective date; or

(ii) Within 90 days of startup in the case of a new source which did not have an initial startup date preceding the effective date.

(3) The Administrator shall be notified at least 30 days prior to an emission test, so that he may at his option observe the test.

(4) An owner or operator may carry out approved design, maintenance, and housekeeping practices. A list of approved design, maintenance, and housekeeping practices may be obtained from the Administrator.

(d) Sludge incineration and drying plants.

(1) Unless a waiver of emission testing is obtained under § 61.13, each owner or operator of a source subject to the standard in § 61.52(b) shall test emissions from that source. Such tests shall be conducted in accordance with the procedures set forth either in paragraph (d) of this section or in § 61.54

(2) Method 101 in Appendix B to this part shall be used to test emissions as follows:

(i) The test shall be performed within 90 days of the effective date of these regulations in the case of an existing source or a new source which has an initial startup date preceding the effective date.

(ii) The test shall be performed within 90 days of startup in the case of a new source which did not have an initial startup date preceding the effective date.

(3) The Administrator shall be notified at least 30 days prior to an emission test, so that he may at his option observe the test.

(4) Samples shall be taken over such a period or periods as are necessary to determine accurately the maximum emissions which will occur in a 24-hour period. No changes shall be made in the operation which would potentially increase emissions above the level determined by the most recent stack test, until the new emission level has been estimated by calculation and the results reported to the Administrator.

(5) All samples shall be analyzed, and mercury emissions shall be determined within 30 days after the stack test. Each determination shall be reported to the Administrator by a registered letter dispatched before the close of the next business day following such determination.

(6) Records of emission test results and other data needed to determine total emissions shall be retained at the source and shall be made available, for inspection by the Administrator, for a minimum of 2 years.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[38 FR 8826, Apr. 6, 1973, as amended at 40 FR 48302, Oct. 14, 1975; 43 FR 8800, Mar. 3, 1978]

§ 61.54 Sludge sampling.

(a) As an alternative means for demonstrating compliance with § 61.52(b), an owner or operator may use Method 105 of Appendix B and the procedures specified in this section.

(1) A sludge test shall be conducted within 90 days of the effective date of these regulations in the case of an existing source or a new source which has an initial startup date preceding the effective date; or

(2) A sludge test shall be conducted within 90 days of startup in the case of a new source which did not have an initial startup date preceding the effective date.

(b) The Administrator shall be notified at least 30 days prior to a sludge sampling test, so that he may at his option observe the test.

(c) Sludge shall be sampled according to paragraph (c)(1) of this section, sludge charging rate for the plant shall be determined according to paragraph (c)(2) of this section, and the sludge analysis shall be performed according to paragraph (c)(3) of this section.

(1) The sludge shall be sampled after dewatering and before incineration or drying, at a location that provides a representative sample of the sludge

that is charged to the incinerator or dryer. Eight consecutive grab samples shall be obtained at intervals of between 45 and 60 minutes and thoroughly mixed into one sample. Each of the eight grab samples shall have a volume of at least 200 ml but not more than 400 ml. A total of three composite samples shall be obtained within an operating period of 24 hours. When the 24-hour operating period is not continuous, the total sampling period shall not exceed 72 hours after the first grab sample is obtained. Samples shall not be exposed to any condition that may result in mercury contamination or loss.

(2) The maximum 24-hour period sludge incineration or drying rate shall be determined by use of a flow rate measurement device that can measure the mass rate of sludge charged to the incinerator or dryer with an accuracy of ±5 percent over its operating range. Other methods of measuring sludge mass charging rates may be used if they have received prior approval by the Administrator.

(3) The handling, preparation, and analysis of sludge samples shall be accomplished according to Method 105 in Appendix B of this part.

(d) The mercury emissions shall be determined by use of the following equation:

$$E_{Hg}=1\times10^{-3}cQ$$

where:

E_{Hg}=Mercury emissions, g/day.
c=Mercury concentration of sludge on a dry solids basis, μg/g (ppm).
Q=Sludge charging rate, kg/day.

(e) No changes in the operation of a plant shall be made after a sludge test has been conducted which would potentially increase emissions above the level determined by the most recent sludge test, until the new emission level has been estimated by calculation and the results reported to the Administrator.

(f) All sludge samples shall be analyzed for mercury content within 30 days after the sludge sample is collected. Each determination shall be reported to the Administrator by a registered letter dispatched before the close of the next business day following such determination.

(g) Records of sludge sampling, charging rate determination and other data needed to determine mercury content of wastewater treatment plant sludges shall be retained at the source and made available, for inspection by the Administrator, for a minimum of 2 years.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[40 FR 48303, Oct. 14, 1975, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.55 Emission monitoring.

(a) Wastewater treatment plant sludge incineration and drying plants. All such sources for which mercury emissions exceed 1600 g/day, demonstrated either by stack sampling according to § 61.53 or sludge sampling according to § 61.54, shall monitor mercury emissions at intervals of at least once per year by use of Method 105 of Appendix B, or the procedures specified in § 61.54 (c) and (d). The results of monitoring shall be reported and retained according to § 61.53(d) (5) and (6), or § 61.54 (f) and (g).

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[40 FR 48303, Oct. 14, 1975, as amended at 43 FR 8800, Mar. 3, 1978]

Subpart F—National Emission Standard for Vinyl Chloride

SOURCE: 41 FR 46564, Oct. 21, 1976, unless otherwise noted.

§ 61.60 Applicability.

(a) This subpart applies to plants which produce:

(1) Ethylene dichloride by reaction of oxygen and hydrogen chloride with ethylene,

(2) Vinyl chloride by any process, and/or

(3) One or more polymers containing any fraction of polymerized vinyl chloride.

(b) This subpart does not apply to equipment used in research and development if the reactor used to polymerize the vinyl chloride processed in the equipment has a capacity of no more than 0.19 m³ (50 gal).

(c) Sections of this subpart other than §§ 61.61; 61.64 (a)(1), (b), (c), and (d); 61.67; 61.68; 61.69; 61.70; and 61.71

do not apply to equipment used in research and development if the reactor used to polymerize the vinyl chloride processed in the equipment has a capacity of greater than 0.19 m^3 (50 gal) and no more than 4.07 m^3 (1100 gal).

[41 FR 46564, Oct. 21, 1976, as amended at 42 FR 29006, June 7, 1977]

§ 61.61 Definitions.

Terms used in this subpart are defined in the Act, in Subpart A of this part, or in this section as follows:

(a) "Ethylene dichloride plant" includes any plant which produces ethylene dichloride by reaction of oxygen and hydrogen chloride with ethylene.

(b) "Vinyl chloride plant" includes any plant which produces vinyl chloride by any process.

(c) "Polyvinyl chloride plant" includes any plant where vinyl chloride alone or in combination with other materials is polymerized.

(d) "Slip gauge" means a gauge which has a probe that moves through the gas/liquid interface in a storage or transfer vessel and indicates the level of vinyl chloride in the vessel by the physical state of the material the gauge discharges.

(e) "Type of resin" means the broad classification of resin referring to the basic manufacturing process for producing that resin, including, but not limited to, the suspension, dispersion, latex, bulk, and solution processes.

(f) "Grade of resin" means the subdivision of resin classification which describes it as a unique resin, i.e., the most exact description of a resin with no further subdivision.

(g) "Dispersion resin" means a resin manufactured in such a way as to form fluid dispersions when dispersed in a plasticizer or plasticizer/diluent mixtures.

(h) "Latex resin" means a resin which is produced by a polymerization process which initiates from free radical catalyst sites and is sold undried.

(i) "Bulk resin" means a resin which is produced by a polymerization process in which no water is used.

(j) "Inprocess wastewater" means any water which, during manufacturing or processing, comes into direct contact with vinyl chloride or polyvinyl chloride or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product containing vinyl chloride or polyvinyl chloride but which has not been discharged to a wastewater treatment process or discharged untreated as wastewater.

(k) "Wastewater treatment process" includes any process which modifies characteristics such as BOD, COD, TSS, and pH, usually for the purpose of meeting effluent guidelines and standards; it does not include any process the purpose of which is to remove vinyl chloride from water to meet requirements of this subpart.

(l) "In vinyl chloride service" means that a piece of equipment contains or contacts either a liquid that is at least 10 percent by weight vinyl chloride or a gas that is at least 10 percent by volume vinyl chloride.

(m) "Standard operating procedure" means a formal written procedure officially adopted by the plant owner or operator and available on a routine basis to those persons responsible for carrying out the procedure.

(n) "Run" means the net period of time during which an emission sample is collected.

(o) "Ethylene dichloride purification" includes any part of the process of ethylene dichloride production which follows ethylene dichloride formation and in which finished ethylene dichloride is produced.

(p) "Vinyl chloride purification" includes any part of the process of vinyl chloride production which follows vinyl chloride formation and in which finished vinyl chloride is produced.

(q) "Reactor" includes any vessel in which vinyl chloride is partially or totally polymerized into polyvinyl chloride.

(r) "Reactor opening loss" means the emissions of vinyl chloride occurring when a reactor is vented to the atmosphere for any purpose other than an emergency relief discharge as defined in § 61.65(a).

(s) "Stripper" includes any vessel in which residual vinyl chloride is removed from polyvinyl chloride resin, except bulk resin, in the slurry form by the use of heat and/or vacuum. In the case of bulk resin, stripper includes any vessel which is used to remove residual vinyl chloride from polyvinyl chloride resin immediately following the polymerization step in the plant process flow.

(t) "Standard temperature" means a temperature of 20° C (69° F).

(u) "Standard pressure" means a pressure of 760 mm of Hg (29.92 in. of Hg).

[41 FR 46564, Oct. 21, 1976, as amended at 42 FR 29006, June 7, 1977]

§ 61.62 Emission standard for ethylene dichloride plants.

(a) Ethylene dichloride purification: The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from any equipment used in ethylene dichloride purification is not to exceed 10 ppm, except as provided in § 61.65(a). This requirement does not apply to equipment that has been opened, is out of operation, and met the requirement in § 61.65(b)(6)(i) before being opened.

(b) Oxychlorination reactor: Except as provided in § 61.65(a), emissions of vinyl chloride to the atmosphere from each oxychlorination reactor are not to exceed 0.2g/kg (0.0002 lb/lb) of the 100 percent ethylene dichloride product from the oxychlorination process.

[42 FR 29006, June 7, 1977]

§ 61.63 Emission standard for vinyl chloride plants.

An owner or operator of a vinyl chloride plant shall comply with the requirements of this section and § 61.65.

(a) Vinyl chloride formation and purification: The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from any equipment used in vinyl chloride formation and/or purification is not to exceed 10 ppm, except as provided in § 61.65(a). This requirement does not apply to equipment that has been opened, is out of operation, and met the requirment in § 61.65(b)(6)(i) before being opened.

§ 61.64 Emission standard for polyvinyl chloride plants.

An owner or operator of a polyvinyl chloride plant shall comply with the requirements of this section and § 61.65.

(a) *Reactor.* The following requirements apply to reactors:

(1) The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from each reactor is not to exceed 10 ppm, except as provided in paragraph (a)(2) of this section and § 61.65(a).

(2) The reactor opening loss from each reactor is not to exceed 0.02 g vinyl chloride/kg (0.00002 lb vinyl chloride/lb) of polyvinyl chloride product, with the product determined on a dry solids basis. This requirement applies to any vessel which is used as a reactor or as both a reactor and a stripper. In the bulk process, the product means the gross product of prepolymerization and postpolymerization.

(3) Manual vent valve discharge: Except for an emergency manual vent valve discharge, there is to be no discharge to the atmosphere from any manual vent valve on a polyvinyl chloride reactor in vinyl chloride service. An emergency manual vent valve discharge means a discharge to the atmosphere which could not have been avoided by taking measures to prevent the discharge. Within 10 days of any discharge to the atmosphere from any manual vent valve, the owner or operator of the source from which the discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.

(b) *Stripper.* The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from each stripper is not to exceed 10 ppm, except as provided in § 61.65(a). This requirement does not apply to equipment that has been opened, is out of operation, and met the requirement in § 61.65(b)(6)(i) before being opened.

(c) *Mixing, weighing, and holding containers.* The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from each mixing, weighing, or holding container in vinyl chloride service which precedes the stripper (or the reactor if the plant has no stripper) in the plant process flow is not to exceed 10 ppm, except as provided in § 61.65(a). This requirement does not apply to equipment that has been opened, is out of operation, and met the requirement in § 61.65(b)(6)(i) before being opened.

(d) *Monomer recovery system.* The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from each monomer recovery system is not to exceed 10 ppm, except as provided in § 61.65(a). This requirement does not apply to equipment that has been opened, is out of operation, and met the requirement in § 61.65(b)(6)(i) before being opened.

(e) *Sources following the stripper(s).* The following requirements apply to emissions of vinyl chloride to the atmosphere from the combination of all sources following the stripper(s) [or the reactor(s) if the plant has no stripper(s)] in the plant process flow including but not limited to, centrifuges, concentrators, blend tanks, filters, dryers, conveyor air discharges, baggers, storage containers, and inprocess wastewater:

(1) In polyvinyl chloride plants using stripping technology to control vinyl chloride emissions, the weighted average residual vinyl chloride concentration in all grades of polyvinyl chloride resin processed through the stripping operation on each calendar day, measured immediately after the stripping operation is completed, may not exceed:

(i) 2000 ppm for polyvinyl chloride dispersion resins, excluding latex resins;

(ii) 400 ppm for all other polyvinyl chloride resins, including latex resins, averaged separately for each type of resin; or

(2) In polyvinyl chloride plants controlling vinyl chloride emissions with technology other than stripping or in addition to stripping, emissions of vinyl chloride to the atmosphere may not exceed:

(i) 2 g/kg (0.002 lb/lb) product from the stripper(s) [or reactor(s) if the plant has no stripper(s)] for dispersion polyvinyl chloride resins, excluding latex resins, with the product determined on a dry solids basis;

(ii) 0.4 g/kg (0.0004 lb/lb) product from the strippers [or reactor(s) if the plant has no stripper(s)] for all other polyvinyl chloride resins, including latex resins, with the product determined on a dry solids basis.

§ 61.65 Emission standard for ethylene dichloride, vinyl chloride and polyvinyl chloride plants.

An owner or operator of an ethylene dichloride, vinyl chloride, and/or polyvinyl chloride plant shall comply with the requirements of this section.

(a) *Relief valve discharge.* Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge. Within 10 days of any relief valve discharge, the owner or operator of the source from which the relief valve discharge occurs shall submit to the Administrator a report in writing containing information on the source, nature and cause of the discharge, the date and time of the discharge, the approximate total vinyl chloride loss during the discharge, the method used for determining the vinyl chloride loss, the action that was taken to prevent the discharge, and measures adopted to prevent future discharges.

(b) *Fugitive emission sources*—(1) *Loading and unloading lines:* Vinyl chloride emissions from loading and unloading lines in vinyl chloride service which are opened to the atmosphere after each loading or unloading operation are to be minimized as follows:

(i) After each loading or unloading operation and before opening a loading or unloading line to the atmosphere, the quantity of vinyl chloride in all parts of each loading or unloading line that are to be opened to the atmosphere is to be reduced so that the parts combined contain no greater than 0.0038 m^3(0.13 ft^3) of vinyl chloride, at standard temperature and pressure; and

(ii) Any vinyl chloride removed from a loading or unloading line in accordance with paragraph (b)(1)(i) of this section is to be ducted through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm, or equivalent as provided in § 61.66.

(2) *Slip gauges.* During loading or unloading operations, the vinyl chloride emissions from each slip gauge in vinyl chloride service are to be minimized by ducting any vinyl chloride discharged from the slip gauge through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm, or equivalent as provided in § 61.66.

(3) Leakage from pump, compressor, and agitator seals:

(i) *Rotating pumps.* Vinyl chloride emissions from seals on all rotating pumps in vinyl chloride service are to be minimized by installing sealless pumps, pumps with double mechanical seals, or equivalent as provided in § 61.66. If double mechanical seals are used, vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the pump; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm; or equivalent as provided in § 61.66.

(ii) *Reciprocating pumps.* Vinyl chloride emissions from seals on all reciprocating pumps in vinyl chloride service are to be minimized by installing double outboard seals, or equivalent as provided in § 61.66. If double outboard seals are used, vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the pump; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm; or equivalent as provided in § 61.66.

(iii) *Rotating compressor.* Vinyl chloride emissions from seals on all rotating compressors in vinyl chloride service are to be minimized by installing compressors with double mechanical seals, or equivalent as provided in § 61.66. If double mechanical seals are used, vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the compressor; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm; or equivalent as provided in § 61.66.

(iv) *Reciprocating compressors.* Vinyl chloride emissions from seals on all reciprocating compressors in vinyl chloride service are to be minimized by installing double outboard seals, or equivalent as provided in § 61.66. If double outboard seals are used, vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the compressor; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm; or equivalent as provided in § 61.66.

(v) *Agitator.* Vinyl chloride emissions from seals on all agitators in vinyl chloride service are to be minimized by installing agitators with double mechanical seals, or equivalent as provided in § 61.66. If double mechanical seals are used, vinyl chloride emissions from the seals are to be minimized by maintaining the pressure between the two seals so that any leak that occurs is into the agitated vessel; by ducting any vinyl chloride between the two seals through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm; or equivalent as provided in § 61.66.

(4) *Leakage from relief valves.* Vinyl chloride emissions due to leakage from each relief valve on equipment in vinyl chloride service are to be minimized by installing a rupture disk between the equipment and the relief valve, by connecting the relief valve discharge to a process line or recovery system, or equivalent as provided in § 61.66.

(5) *Manual venting of gases.* Except as provided in § 61.64(a)(3), all gases which are manually vented from equipment in vinyl chloride service are

to be ducted through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm; or equivalent as provided in § 61.66.

(6) *Opening of equipment.* Vinyl chloride emissions from opening of equipment (including loading or unloading lines that are not opened to the atmosphere after each loading or unloading operation) are to be minimized as follows:

(i) Before opening any equipment for any reason, the quantity of vinyl chloride is to be reduced so that the equipment contains no more than 2.0 percent by volume vinyl chloride or 0.0950 m^3 (25 gal) of vinyl chloride, whichever is larger, at standard temperature and pressure; and

(ii) Any vinyl chloride removed from the equipment in accordance with paragraph (b)(6)(i) of this section is to be ducted through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm, or equivalent as provided in § 61.66.

(7) *Samples.* Unused portions of samples containing at least 10 percent by weight vinyl chloride are to be returned to the process, and sampling techniques are to be such that sample containers in vinyl chloride service are purged into a closed process system.

(8) *Leak detection and elimination.* Vinyl chloride emissions due to leaks from equipment in vinyl chloride service are to be minimized by instituting and implementing a formal leak detection and elimination program. The owner or operator shall submit a description of the program to the Administrator for approval. The program is to be submitted within 45 days of the effective date of these regulations, unless a waiver of compliance is granted under § 61.11. If a waiver of compliance is granted, the program is to be submitted on a date scheduled by the Administrator. Approval of a program will be granted by the Administrator provided he finds:

(i) It includes a reliable and accurate vinyl chloride monitoring system for detection of major leaks and identification of the general area of the plant where a leak is located. A vinyl chloride monitoring system means a device which obtains air samples from one or more points on a continuous sequential basis and analyzes the samples with gas chromatography or, if the owner or operator assumes that all hydrocarbons measured are vinyl chloride, with infrared spectrophotometry, flame ion detection, or an equivalent or alternative method.

(ii) It includes a reliable and accurate portable hydrocarbon detector to be used routinely to find small leaks and to pinpoint the major leaks indicated by the vinyl chloride monitoring system. A portable hydrocarbon detector means a device which measures hydrocarbons with a sensitivity of at least 10 ppm and is of such design and size that it can be used to measure emissions from localized points.

(iii) It provides for an acceptable calibration and maintenance schedule for the vinyl chloride monitoring system and portable hydrocarbon detector. For the vinyl chloride monitoring system, a daily span check is to be conducted with a concentration of vinyl chloride equal to the concentration defined as a leak according to paragraph (b)(8)(vi) of this section. The calibration is to be done with either:

(A) A calibration gas mixture prepared from the gases specified in sections 5.2.1 and 5.2.2 of Test Method 106 and in accordance with section 7.1 of Test Method 106, or

(B) A calibration gas cylinder standard containing the appropriate concentration of vinyl chloride. The gas composition of the calibration gas cylinder standard is to have been certified by the manufacturer. The manufacturer must have recommended a maximum shelf life for each cylinder so that the concentration does not change greater than ±5 percent from the certified value. The date of gas cylinder preparation, certified vinyl chloride concentration and recommended maximum shelf life must have been affixed to the cylinder before shipment from the manufacturer to the buyer. If a gas chromatograph is used as the vinyl chloride monitoring system, these gas mixtures may be directly used to prepare a chromatograph calibration curve as described in section 7.3 of Test Method 106. The requirements in section 5.2.3.1 and 5.2.3.2 of Test Method 106 for certification of cylinder standards and for establishment and verification of calibration standards are to be followed.

(iv) The location and number of points to be monitored and the frequency of monitoring provided for in the program are acceptable when they are compared with the number of pieces of equipment in vinyl chloride service and the size and physical layout of the plant.

(v) It contains an acceptable plan of action to be taken when a leak is detected.

(vi) It contains a definition of leak which is acceptable when compared with the background concentrations of vinyl chloride in the areas of the plant to be monitored by the vinyl chloride monitoring system. Measurements of background concentrations of vinyl chloride in the areas of the plant to be monitored by the vinyl chloride monitoring system are to be included with the description of the program. The definition of leak for a given plant may vary among the different areas within the plant and is also to change over time as background concentrations in the plant are reduced.

(9) *Inprocess wastewater.* Vinyl chloride emissions to the atmosphere from inprocess wastewater are to be reduced as follows:

(i) The concentration of vinyl chloride in each inprocess wastewater stream containing greater than 10 ppm vinyl chloride measured immediately as it leaves a piece of equipment and before being mixed with any other inprocess wastewater stream is to be reduced to no more than 10 ppm by weight before being mixed with any other inprocess wastewater stream which contains less than 10 ppm vinyl chloride; before being exposed to the atmosphere; before being discharged to a wastewater treatment process; or before being discharged untreated as a wastewater. This paragraph does apply to water which is used to displace vinyl chloride from equipment before it is opened to the atmosphere in accordance with § 61.64(a)(2) or paragraph (b)(6) of this section, but does not apply to water which is used to wash out equipment after the equipment has already been opened to the atmosphere in accordance with § 61.64(a)(2) or paragraph (b)(6) of this section. (ii) Any vinyl chloride removed from the inprocess wastewater in accordance with paragraph (b)(9)(i) of this section is to be ducted through a control system from which the concentration of vinyl chloride in the exhaust gases does not exceed 10 ppm, or equivalent as provided in § 61.06.

(c) The requirements in paragraphs (b)(1), (b)(2), (b)(5), (b)(6), (b)(7) and (b)(8) of this section are to be incorporated into a standard operating procedure, and made available upon request for inspection by the Administrator. The standard operating procedure is to include provisions for measuring the vinyl chloride in equipment 4.75 m³ (1,250 gal) in volume for which an emission limit is prescribed in § 61.65(b)(6)(i) prior to opening the equipment and using Test Method 106, a portable hydrocarbon detector, or an equivalent or alternative method. The method of measurement is to meet the requirements in § 61.67(g)(5)(i)(A) or (g)(5)(i)(B).

[41 FR 46564, Oct. 21, 1976; 41 FR 53017, Dec. 3, 1976, as amended at 42 FR 29006, June 7, 1977]

§ 61.66 Equivalent equipment and procedures.

Upon written application from an owner or operator, the Administrator may approve use of equipment or procedures which have been demonstrated to his satisfaction to be equivalent in terms of reducing vinyl chloride emissions to the atmosphere to those prescribed for compliance with a specific paragraph of this subpart. For an existing source, any request for using an equivalent method as the initial measure of control is to be submitted to the Administrator within 30 days of the effective date. For a new source, any request for using an equivalent method is to be submitted to the Administrator with the application for approval of construction or modification required by § 61.07.

§ 61.67 Emission tests.

(a) Unless a waiver of emission testing is obtained under § 61.13, the owner or operator of a source to which this subpart applies shall test emissions from the source,

(1) Within 90 days of the effective date in the case of an existing source or a new source which has an initial startup date preceding the effective date, or

(2) Within 90 days of startup in the case of a new source, initial startup of which occurs after the effective date.

(b) The owner or operator shall provide the Administrator at least 30 days prior notice of an emission test to afford the Administrator the opportunity to have an observer present during the test.

(c) Any emission test is to be conducted while the equipment being tested is operating at the maximum production rate at which the equipment will be operated and under other relevant conditions as may be specified by the Administrator based on representative performance of the source.

(d) [Reserved]

(e) When at all possible, each sample is to be analyzed within 24 hours, but in no case in excess of 72 hours of sample collection. Vinyl chloride emissions are to be determined within 30 days after the emission test. The owner or operator shall report the determinations to the Administrator by a registered letter dispatched before the close of the next business day following the determination.

(f) The owner or operator shall retain at the plant and make available, upon request, for inspection by the Administrator, for a minimum of 2 years records of emission test results and other data needed to determine emissions.

(g) Unless otherwise specified, the owner or operator shall use test Test Methods in Appendix B to this part for each test as required by paragraphs (g)(1), (g)(2), (g)(3), (g)(4), and (g)(5) of this section, unless an equivalent method or an alternative method has been approved by the Administrator. If the Administrator finds reasonable grounds to dispute the results obtained by an equivalent or alternative method, he may require the use of a reference method. If the results of the reference and equivalent or alternative methods do not agree, the results obtained by the reference method prevail, and the Administrator may notify the owner or operator that approval of the method previously considered to be equivalent or alternative is withdrawn.

(1) Test Method 106 is to be used to determine the vinyl chloride emissions from any source for which an emission limit is prescribed in §§ 61.62(a) or (b) § 61.63(a), or §§ 61.64(a)(1), (b), (c), or (d), or from any control system to which reactor emissions are required to be ducted in § 61.64(a)(2) or to which fugitive emissions are required to be ducted is § 61.65(b)(1)(ii), (b)(2), (b)(5), (b)(6)(ii), or (b)(9)(ii).

(i) For each run, one sample is to be collected. The sampling site is to be at least two stack or duct diameters downstream and one half diameter upstream from any flow disturbance such as a bend, expansion, contraction, or visible flame. For a rectangular cross section an equivalent diameter is to be determined from the following equation:

equivalent diameter = 2 (length) (width)/ length + width

The sampling point in the duct is to be at the centroid of the cross section. The sample is to be extracted at a rate proportional to the gas velocity at the sampling point. The sample is to be taken over a minimum of one hour, and is to contain a minimum volume of 50 liters corrected to standard conditions.

(ii) Each emission test is to consist of three runs. For the purpose of determining emissions, the average of results of all runs is to apply. The average is to be computed on a time weighted basis.

(iii) For gas streams containing more than 10 percent oxygen the concentration of vinyl chloride as determined by Test Method 106 is to be corrected to 10 percent oxygen (dry basis) for determination of emissions by using the following equation:

$$C_{b\ (corrected)} = C_b\ 10.9/20.9 - \text{percent } O_2$$

where:

$C_{b\ (corrected)}$ = The concentration of vinyl chloride in the exhaust gases, corrected to 10-percent oxygen.

C_b = The concentration of vinyl chloride as measured by Test Method 106.

20.9=Percent oxygen in the ambient air at standard conditions.
10.9=Percent oxygen in the ambient air at standard conditions, minus the 10.0-percent oxygen to which the correction is being made.
Percent O_2=Percent oxygen in the exhaust gas as measured by Reference Method 3 in Appendix A of Part 60 of this chapter.

(iv) For those emission sources where the emission limit is prescribed in terms of mass rather than concentration, mass emissions in kg/100 kg product are to be determined by using the following equation:

$$C_{BX}=[C_b(2.60)\ Q\ 10^{-6}]\ [100]/Z$$

where:

C_{BX}=kg vinyl chloride/100 kg product.
C_b=The concentration of vinyl chloride as measured by Test Method 106.
2.60=Density of vinyl chloride at one atmosphere and 20° C in kg/m^3.
Q=Volumetric flow rate in m^3/hr as determined by Reference Method 2 of Appendix A to Part 60 of this chapter.
10^{-6}=Conversion factor for ppm.
Z=Production rate (kg/hr).

(2) Test Method 107 is to be used to determine the concentration of vinyl chloride in each inprocess wastewater stream for which an emission limit is prescribed in § 61.65(b)(9)(i).

(3) Where a stripping operation is used to attain the emission limit in § 61.64(e), emissions are to be determined using Test Method 107 as follows:

(i) The number of strippers and samples and the types and grades of resin to be sampled are to be determined by the Administrator for each individual plant at the time of the test based on the plant's operation.

(ii) Each sample is to be taken immediately following the stripping operation.

(iii) The corresponding quantity of material processed by each stripper is to be determined on a dry solids basis and by a method submitted to and approved by the Administrator.

(iv) At the prior request of the Administrator, the owner or operator shall provide duplicates of the samples required in paragraph (g)(3)(i) of this section.

(4) Where control technology other than or in addition to a stripping operation is used to attain the emission limit in § 61.64(e), emissions are to be determined as follows:

(i) Test Method 106 is to be used to determine atmospheric emissions from all of the process equipment simultaneously. The requirements of paragraph (g)(1) of this section are to be met.

(ii) Test Method 107 is to be used to determine the concentration of vinyl chloride in each inprocess wastewater stream subject to the emission limit prescribed in § 61.64(e). The mass of vinyl chloride in kg/100 kg product in each inprocess wastewater stream is to be determined by using the following equation:

$$C_{BX}=[C_dR10^{-6}]\ [100]/Z$$

where:

C_{BX}=kg vinyl chloride/100 kg product.
C_d=the concentration of vinyl chloride as measured by Test Method 107.
R=water flow rate in 1/hr, determined in accordance with a method which has been submitted to and approved by the Administrator.
10^{-6}=Conversion factor for ppm.
Z=Production rate (kg/hr), determined in accordance with a method which has been submitted and approved by the Administrator.

(5) The reactor opening loss for which an emission limit is prescribed in § 61.64 (a)(2) is to be determined. The number of reactors for which the determination is to be made is to be specified by the Administrator for each individual plant at the time of the determination based on the plant's operation. For a reactor that is also used as a stripper, the determination may be made immediately following the stripping operation.

(i) Except as provided in paragraph (g)(5)(ii) of this section, the reactor opening loss is to be determined using the following equation:

$$C=W(2.60)(10^{-6})(Cb)/YZ$$

where:

C=kg vinyl chloride emissions/kg product.
W=Capacity of the reactor in m^3.
2.60=Density of vinyl chloride at one atmosphere and 20° C in kg/m^3.
10^{-6}=Conversion factor for ppm.
C_b=ppm by volume vinyl chloride as determined by Test Method 106 or a portable hydrocarbon detector which measures hydrocarbons with a sensitivity of at least 10 ppm.

Y=Number of batches since the reactor was last opened to the atmosphere.

Z=Average kg of polyvinyl chloride produced per batch in the number of batches since the reactor was last opened to the atmosphere.

(A) If Method 106 is used to determine the concentration of vinyl chloride (Cb), the sample is to be withdrawn at a constant rate with a probe of sufficient length to reach the vessel bottom from the manhole. Samples are to be taken for 5 minutes within 6 inches of the vessel bottom, 5 minutes near the vessel center, and 5 minutes near the vessel top.

(B) If a portable hydrocarbon detector is used to determine the concentration of vinyl chloride (Cb), a probe of sufficient length to reach the vessel bottom from the manhole is to be used to make the measurements. One measurement will be made within 6 inches of the vessel bottom, one near the vessel center and one near the vessel top. Measurements are to be made at each location until the reading is stabilized. All hydrocarbons measured are to be assumed to be vinyl chloride.

(C) The production rate of polyvinyl chloride (Z) is to be determined by a method submitted to and approved by the Administrator.

(ii) A calculation based on the number of evacuations, the vacuum involved, and the volume of gas in the reactor is hereby approved by the Administrator as an alternative method for determining reactor opening loss for postpolymerization reactors in the manufacture of bulk resins.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[41 FR 46564, Oct. 21, 1976, as amended at 42 FR 29007, June 7, 1977; 43 FR 8800, Mar. 3, 1978]

§ 61.68 Emission monitoring.

(a) A vinyl chloride monitoring system is to be used to monitor on a continuous basis the emissions from the sources for which emission limits are prescribed in § 61.62(a) and (b), § 61.63(a), and § 61.64 (a)(1), (b), (c), and (d), and for any control system to which reactor emissions are required to be ducted in § 61.64(a)(2) or to which fugitive emissions are required to be ducted in § 61.65 (b)(1)(ii), and (b)(2), (b)(5), (b)(6) (ii), and (b)(9)(ii).

(b) The vinyl chloride monitoring system(s) used to meet the requirement in paragraph (a) of this section is to be a device which obtains air samples from one or more points on a continuous sequential basis and analyzes the samples with gas chromotography or, if the owner or operator assumes that all hydrocarbons measured are vinyl chloride, with infrared spectrophotometry, flame ion detection, or an equivalent or alternative method. The vinyl chloride monitoring system used to meet the requirements in § 61.65(b)(8)(i) may be used to meet the requirements of this section.

(c) A daily span check is to be conducted for each vinyl chloride monitoring system used. For all of the emission sources listed in paragraph (a) of this section, except the one for which an emission limit is prescribed in § 61.62(b), the daily span check is to be conducted with a concentration of vinyl chloride equal to 10 ppm. For the emission source for which an emission limit is prescribed in § 61.62(b), the daily span check is to be conducted with a concentration of vinyl chloride which is determined to be equivalent to the emission limit for that source based on the emission test required by § 61.67. The calibration is to be done with either:

(1) A calibration gas mixture prepared from the gases specified in sections 5.2.1 and 5.2.2 of Test Method 106 and in accordance with section 7.1 of Test Method 106, or

(2) A calibration gas cylinder standard containing the appropriate concentration of vinyl chloride. The gas composition of the calibration gas cylinder standard is to have been certified by the manufacturer. The manufacturer must have recommended a maximum shelf life for each cylinder so that the concentration does not change greater than ±5 percent from the certified value. The date of gas cylinder preparation, certified vinyl chloride concentration and recommended maximum shelf life must have been affixed to the cylinder before shipment from the manufacturer to the buyer. If a gas chromatograph is used as the vinyl chloride monitoring

system, these gas mixtures may be directly used to prepare a chromatograph calibration curve as described in section 7.3 of Test Method 106. The requirements in sections 5.2.3.1 and 5.2.3.2 of Test Method 106 for certification of cylinder standards and for establishment and verification of calibration standards are to be followed.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[41 FR 46564, Oct. 21, 1976; 41 FR 53017, Dec. 3, 1976, as amended at 42 FR 29007, June 7, 1977; 43 FR 8800, Mar. 3, 1978]

§ 61.69 Initial report.

(a) An owner or operator of any source to which this subpart applies shall submit a statement in writing notifying the Administrator that the equipment and procedural specifications in § 61.65 (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), and (b)(8) are being implemented.

(b)(1) In the case of an existing source or a new source which has an initial startup date preceding the effective date, the statement is to be submitted within 90 days of the effective date, unless a waiver of compliance is granted under § 61.11, along with the information required under § 61.10. If a waiver of compliance is granted, the statement is to be submitted on a date scheduled by the Administrator.

(2) In the case of a new source which did not have an initial startup date preceding the effective date, the statement is to be submitted within 90 days of the initial startup date.

(c) The statement is to contain the following information:

(1) A list of the equipment installed for compliance,

(2) A description of the physical and functional characteristics of each piece of equipment,

(3) A description of the methods which have been incorporated into the standard operating procedures for measuring or calculating the emissions for which emission limits are prescribed in § 61.65 (b)(1)(i) and (b)(6)(i),

(4) A statement that each piece of equipment is installed and that each piece of equipment and each procedure is being used.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[41 FR 46564, Oct. 21, 1976, as amended at 43 FR 8800, Mar. 3, 1978]

§ 61.70 Semiannual report.

(a) The owner or operator of any source to which this subpart applies shall submit to the Administrator on September 15 and March 15 of each year a report in writing containing the information required by this section. The first semiannual report is to be submitted following the first full 6 month reporting period after the initial report is submitted.

(b)(1) In the case of an existing source or a new source which has an initial startup date preceding the effective date, the first report is to be submitted within 180 days of the effective date, unless a waiver of compliance is granted under § 61.11. If a waiver of compliance is granted, the first report is to be submitted on a date scheduled by the Administrator.

(2) In the case of a new source which did not have an initial startup date preceding the effective date, the first report is to be submitted within 180 days of the initial startup date.

(c) Unless otherwise specified, the owner or operator shall use the Test Methods in Appendix B to this part to conduct emission tests as required by paragraphs (c)(2) and (c)(3) of this section, unless an equivalent or an alternative method has been approved by the Administrator. If the Administrator finds reasonable grounds to dispute the results obtained by an equivalent or alternative method, he may require the use of a reference method. If the results of the reference and equivalent or alternative methods do not agree, the results obtained by the reference method prevail, and the Administrator may notify the owner or operator that approval of the method previously considered to be equivalent or alternative is withdrawn.

(1) The owner or operator shall include in the report a record of any emissions which averaged over any hour period (commencing on the hour) are in excess of the emission limits prescribed in §§ 61.62(a) or (b), § 61.63 (a), or § 61.64 (a)(1), (b), (c), or (d), or for any control system to which

reactor emissions are required to be ducted in § 61.64(a)(2) or to which fugitive emissions are required to be ducted in § 61.65 (b)(1)(ii), (b)(2), (b)(5), (b)(6)(ii), or (b)(9)(ii). The emissions are to be measured in accordance with § 61.68.

(2) In polyvinyl chloride plants for which a stripping operation is used to attain the emission level prescribed in § 61.64(e), the owner or operator shall include in the report a record of the vinyl chloride content in the polyvinyl chloride resin. Test Method 107 is to be used to determine vinyl chloride content as follows:

(i) If batch stripping is used, one representative sample of polyvinyl chloride resin is to be taken from each batch of each grade of resin immediately following the completion of the stripping operation, and identified by resin type and grade and the date and time the batch is completed. The corresponding quantity of material processed in each stripper batch is to be recorded and identified by resin type and grade and the date and time the batch is completed.

(ii) If continuous stripping is used, one representative sample of polyvinyl chloride resin is to be taken for each grade of resin processed or at intervals of 8 hours for each grade of resin which is being processed, whichever is more frequent. The sample is to be taken as the resin flows out of the stripper and identified by resin type and grade and the date and time the sample was taken. The corresponding quantity of material processed by each stripper over the time period represented by the sample during the 8-hour period, is to be recorded and identified by resin type and grade and the date and time it represents.

(iii) The quantity of material processed by the stripper is to be determined on a dry solids basis and by a method submitted to and approved by the Administrator.

(iv) At the prior request of the Administrator, the owner or operator shall provide duplicates of the samples required in paragraphs (c)(2)(i) and (c)(2)(ii) of this section.

(v) The report to the Administrator by the owner or operator is to include the vinyl chloride content found in each sample required by paragraphs (c)(2) (i) and (c)(2)(ii) of this section, averaged separately for each type of resin, over each calendar day and weighted according to the quantity of each grade of resin processed by the stripper(s) that calendar day, according to the following equation:

$$A_{T_i} = \frac{\sum_{i}^{n} =1\, P_{G_i} M_{G_i}}{Q_{T_i}} = \frac{P_{G_1} M_{G_1} + P_{G_2} M_{G_2} + \cdots + P_{G_n} M_{G_n}}{Q_{T_i}}$$

where:

A=24-hour average concentration of type, T_i resin in ppm (dry weight basis).

Q=Total production of type T_i resin over the 24-hour period, in kg.

T_i=Type of resin; $i=1,2 \ldots m$ where m is total number of resin types produced during the 24-hour period.

M=Concentration of vinyl chloride in one sample of grade G_i resin, in ppm.

P=Production of grade G_i resin represented by the sample, in kg.

G_i=Grade of resin; e.g., G_1, G_2, and G_3.

n=Total number of grades of resin produced during the 24-hour period.

(vi) The owner or operator shall retain at the source and make available for inspection by the Administrator for a minimum of 2 years records of all data needed to furnish the information required by paragraph (c)(2)(v) of this section The records are to contain the following information:

(A) The vinyl chloride content found in all the samples required in paragraphs (c)(2)(i) and (c)(2)(ii) of this section, identified by the resin type and grade and the time and date of the sample, and

(B) The corresponding quantity of polyvinyl chloride resin processed by the stripper(s), identified by the resin type and grade and the time and date it represents.

(3) The owner or operator shall include in the report a record of the emissions from each reactor opening for which an emission limit is prescribed in § 61.64(a)(2). Emissions are to be determined in accordance with § 61.67(g)(5), except that emissions for

each reactor are to be determined. For a reactor that is also used as a stripper, the determination may be made immediately following the stripping operation.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[41 FR 46564, Oct. 21, 1976; 41 FR 53018, Dec. 3, 1976, as amended at 42 FR 29007, June 7, 1977; 43 FR 8800, Mar. 3, 1978]

§ 61.71 Record keeping.

(a) The owner or operator of any source to which this subpart applies shall retain the following information at the source and make it available for inspection by the Administrator for a minimum of two years;

(1) A record of the leaks detected by the vinyl chloride monitoring system, as required by § 61.65(b)(8), including the concentrations of vinyl chloride measured, analyzed, and recorded by the vinyl chloride detector, the location of each measurement and the date and approximate time of each measurement.

(2) A record of the leaks detected during routine monitoring with the portable hydrocarbon detector and the action taken to repair the leaks, as required by § 61.65(b)(8), including a brief statement explaining the location and cause of each leak detected with the portable hydrocarbon detector, the date and time of the leak, and any action taken to eliminate that leak.

(3) A record of emissions measured in accordance with § 61.68.

(4) A daily operating record for each polyvinyl chloride reactor, including pressures and temperatures.

(Sec. 114, Clean Air Act as amended (42 U.S.C. 7414))

[41 FR 46594, Oct. 21, 1976, as amended at 42 FR 29007, June 7, 1977; 43 FR 8800, Mar. 3, 1978]

APPENDIX A

National Emission Standards for Hazardous Air Pollutants

Compliance Status Information

I. SOURCE REPORT

INSTRUCTIONS: Owners or operators of sources of hazardous pollutants subject to the National Emission Standards for Hazardous Air Pollutants are required to submit the information contained in Section I to the appropriate U.S. Environmental Protection Agency Regional Office prior to 90 days after the effective date of any standards or amendments which require the submission of such information.

A list of regional offices is provided in §61.04. ____________________

A. SOURCE INFORMATION

1. Identification/Location - Indicate the name and address of each source.

1 2 Region 3 4 State 5 8 County 9 13 Source Number 0 0 0 14 16 0 0 17 18 1 19

20 22 AQCR # 23 26 City Code 27 Source Name 46

47 Street Address (Location of Plant) 66 80

Dup 1-18 19 20 City Name 34 State 35 39

40 State Regis. Number 54 55 58 NEDS X Ref.

59 SIC 62 FF 64 8 A/P 65 77 79 Staff 80

Dup 1-18 5 19 CS 30 STP 31 EC 49 80

2. Contact - Indicate the name and telephone number of the owner or operator or other responsible official whom EPA may contact concerning this report.

Dup 1-18 4 1
19 20 21 Name 43

44 46
Area Code 47 Number - 54 80

3. Source Description - Briefly state the nature of the source (e.g., "Chlor-alkali Plant" or "Machine Shop").

Dup 1-18 4 2
19 20 21 Description 50

51 Continued 79 80

4. Alternative Mailing Address - Indicate an alternative mailing address if correspondence is to be directed to a location different than that specified above.

Dup 1-18 4 3
19 20 21 Number Street or Box Number 45 80

Dup 1-18 4 4 37 38
19 20 21 City 35 State 41 Zip 44 80

5. Compliance Status - The emissions from this source ___ can ___ cannot meet the emission limitations contained in the National Emission Standards on or prior to 90 days after the effective date of any standards or amendments which require the submission of such information.

Signature of Owner, Operator or Other Responsible Official

NOTE: If the emissions from the source will exceed those limits set by the National Emission Standards for Hazardous Air Pollutants, the source will be in violation and subject to Federal enforcement actions unless granted a waiver of compliance by the Administrator of the U.S. Environmental Protection Agency. The information needed for such waivers is listed in Section II of this form.

B. PROCESS INFORMATION. Part B should be completed separately for each point of emission for each hazardous pollutant. [Sources subject to 61.22(l) may omit number 4. below.]

Dup 1-13 0 0 5
14 16 17 18 19 20 SCC 27 28 29 30 31
NEDS X Ref LS SIP

1. Pollutant Emitted - Indicate the type of hazardous pollutant emitted by the process. Indicate "AB" for asbestos, "BE" for beryllium, or "HG" for mercury.

32 33
Pollutant | 34 Regulation 48 49 EC

2. Process Description - Provide a brief description of each process (e.g., "hydrogen end box" in a mercury chlor-alkali plant, "grinding machine" in a beryllium machine shop). Use additional sheets if necessary.

50 Process Description 74 | 80

Dup 1-18 6 1
19 20 21 50

51 79 80

Dup 1-18 6 2
19 20 21 50

51 79 80

3. Amount of Pollutant - Indicate the average weight of the hazardous material named in Item 1 which enters the process in pounds per month (based on the previous twelve months of operation).

Dup 1-18 6 3
19 20 | 21 27 | lbs./mo.
29 36 80

4. Control Devices
   a. Indicate the type of pollution control devices, if any, used to reduce the emissions from the process (e.g., venturi scrubber, baghouse, wet cyclone) and the estimated percent of the pollutant which the device removes from the process gas stream.

Dup 1-18 6 4 PRIMARY CONTROL DEVICE:
19 20 21 43

66 70
45 Primary Device Name 64 Percent Removal Efficiency | 72 79

80

Dup 1-18 6 5 SECONDARY CONTROL DEVICES:
19 20 21 45

47 Secondary Device Name 64 66 70 Percent Removal Efficiency % EFFIC. 72 79 80

b. Asbestos Emission Control Devices Only

i. If a baghouse is specified in Item 4a, give the following information:

- The air flow permeability in cubic feet per minute per square foot of fabric area.

  Air flow permeability = __________ cfm/ft^2

- The pressure drop in inches water gauge across the filter at which the baghouse is operated.

  Operating pressure drop = __________ inches w.g.

- If the baghouse material contains synthetic fill yarn, check whether this material is / / spun / / or not spun.

- If the baghouse utilizes a felted fabric, give the minimum thickness in inches and the density in ounces per square yard.

  Thickness = _________ inches Density = ________ oz/yd^2

ii. If a wet collection device is specified in Item 4a, give the designed unit contacting energy in inches water gauge.

- Unit contacting energy = _________ inches w.g.

C. DISPOSAL OF ASBESTOS-CONTAINING WASTES. Part C should be completed separately for each asbestos-containing waste generation operation arising from sources subject to §61.22(a), (c), (e), and (h).

Dup 1-13 0 0 5
14 16 17 18 19 20 SCC 27 28 29 NEDS X Ref 30 CS 31 SIP

A B
32 33 Pollutant 34 Regulation 48 49 EC

1. Waste Generation - Provide a brief description of each process that generates asbestos-containing waste (e.g. disposal of control device wastes).

50 ________ Process Description ________ 79 80

2. Asbestos Concentration - Indicate the average percentage asbestos content of these materials.

Dup 1-18 6 1 19 20 21 ________ ASBESTOS CONCENTRATION: ________ 43 45 ________ 48

% 50 80

3. Amount of Wastes - Indicate the average weight of asbestos-containing wastes disposed of, measured in kg/day.

Dup 1-18 6 2 19 20 21 ________ 27 29 ________ kg/day 34 80

4. Control Methods - Indicate the emission control methods used in all stages of waste disposal, from collection, processing, and packaging to transporting and deposition.

Dup 1-18 6 3 19 20 21 ________ Primary Control Method ________ 43

45 ________ 79 80

Dup 1-18 6 4 19 20 21 ________ 50

51 ________ 79 80

5. Waste Disposal - Indicate the type of disposal site (sanitary landfill, open, covered) or incineration site (municipal, private) where the waste is disposed of and who operates the site (company, private, municipal). State the name and location of the site (closest city or town, county, state).

Dup 1-18 6 5 19 20 21 ________ TYPE OF SITE: ________ 33 35 ________ 50

51 ________ 79 80

Dup 1-18 6 6 OPERATOR:
19 20 21 29 31 50

51 79 80

Dup 1-18 6 7 LOCATION:
19 20 21 29

31 70

71 79 80

D. WASTE DISPOSAL SITES. Part D should be completed separately for each asbestos waste disposal site subject to section 61.22(1).

Dup 1-13 0 0 5
14 16 17 18 19 20 SCC 27 28 29 NEDS X Ref 30 CS 31 SIP

A B
32 33 Pollutant 34 Regulation 48 49 EC

WASTE DISPOSAL SITE
50 68 80

1. Description - Provide a brief description of the site, including its size and configuration, and the distance to the closest city or town, closest residence, and closest primary road.

Dup 1-18 6 1 SITE DESCRIPTION
19 20 21 37 39 50

51 79 80

Dup 1-18 6 2 DISTANCE: TOWN: K M
19 20 21 29 30 34 36 40 42 43

RESIDENCE: K M ROAD:
45 54 56 60 62 63 65 69 71 75

K M
77 78 80

2. Inactivation - After the site is inactivated, indicate the method or methods used to comply with the standard and send a list of the actions that will be undertaken to maintain the inactivated site.

Dup 1-18 6 8
19 20 21 ______ COMPLIANCE METHOD/INACTIVE SITE: ______ 52

54 ______________________________ 79 80

II. WAIVER REQUESTS

A. WAIVER OF COMPLIANCE. Owners or operators of sources unable to operate in compliance with the National Emission Standards for Hazardous Air Pollutants prior to 90 days after the effective date of any standards or amendments which require the submission of such information may request a waiver of compliance from the Administrator of the U.S. Environmental Protection Agency for the time period necessary to install appropriate control devices or make modifications to achieve compliance. The Administrator may grant a waiver of compliance with the standard for a period not exceeding two years from the effective date of the hazardous pollutant standards, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

The report information provided in Section I must accompany this application. Applications should be sent to the appropriate EPA regional office.

1. Processes Involved - Indicate the process or processes emitting hazardous pollutants to which emission controls are to be applied.

2. Controls

   a. Describe the proposed type of control device to be added or modification to be made to the process to reduce the emissions of hazardous pollutants to an acceptable level. (Use additional sheets if necessary.)

   b. Describe the measures that will be taken during the waiver period to assure that the health of persons will be protected from imminent endangerment. (Use additional sheets if necessary.)

3. Increments of Progress - Specify the dates by which the following increments of progress will be met.

   - Date by which contracts for emission control systems or process modifications will be awarded; or date by which orders will be issued for the purchase of the component parts to accomplish emission control or process modification.

Dup 1-16 0 1 7
17 19 53 54 55 60 61 MO/DY/YR 66 80

- Date of initiation of on-site construction or installation of emission control equipment or process change.

Dup 1-16 0 2 7
17 19 53 54 55 60 61 MO/DY/YR 66 80

- Date by which on-site construction or installation of emission control equipment or process modification is to be completed.

Dup 1-16 0 3 7
17 19 53 54 55 60 61 MO/DY/YR 66 80

- Date by which final compliance is to be achieved.

Dup 1-16 0 4 7
17 19 53 54 55 60 61 MO/DY/YR 66 80

B. WAIVER OF EMISSION TESTS. A waiver of emission testing may be granted to owners or operators of sources of beryllium or mercury pollutants if, in the judgment of the Administrator of the Environmental Protection Agency the emissions from the source comply with the appropriate standard or if the owners or operators of the source have requested a waiver of compliance or have been granted a waiver of compliance.

This application should accompany the report information provided in Section I.

1. Reason - State the reasons for requesting a waiver of emission testing. If the reason stated is that the emissions from the source are within the prescribed limits, documentation of this condition must be attached.

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Date Signature of the owner or operator

(Sec. 114, of the Clean Air Act as amended (42 U.S.C. 7414))

[40 FR 48303, Oct. 14, 1975, as amended at 43 FR 8800, Mar. 3, 1978]

federal register

Thursday
August 7, 1980

Part III

Environmental Protection Agency

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, and 124

[FRL 1538-2]

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency.

ACTION: Final rules.

SUMMARY: In response to the decision of the U.S. Court of Appeals for the D.C. Circuit in *Alabama Power Company* v. *Costle*, EPA is today amending its regulations for the prevention of significant deterioration of air quality, 40 CFR 51.24, 52.21. Today's amendments also include regulatory changes affecting new source review in nonattainment areas, including restrictions on major source growth (40 CFR 52.24) and requirements under EPA's Emission Offset Interpretative Ruling (40 CFR Part 51, Appendix S) and Section 173 of the Clean Air Act (40 CFR 51.18 (j)).

DATES: The regulatory amendments announced here come into effect on August 7, 1980. State Implementation Plan revisions meeting today's regulatory changes are to be submitted to EPA within nine months after this publication.

FOR FURTHER INFORMATION CONTACT: James B. Weigold, Standards Implementation Branch (MD-15), Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 919/541-5292.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline. A section entitled Summary of PSD Program has been added to provide a concise narrative overview of this program.

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I. Summary of PSD Program

The purpose of this summary is to help those people who are unfamiliar with the PSD program gain an understanding of it. Because this summary seeks to condense the basic PSD rules, it may not precisely reflect the amendments announced in this notice. Should there be any apparent inconsistency between the summary and the remainder of the preamble and the regulations, the remaining preamble and the regulations shall govern.

A. PSD Allows Industrial Growth Within Specific Air Quality Goals

The basic goals of the prevention of significant air quality deterioration (PSD) regulations are (1) to ensure that economic growth will occur in harmony with the preservation of existing clean air resources to prevent the development of any new nonattainment problems; (2) to protect the public health and welfare from any adverse effect which might occur even at air pollution levels better than the national ambient air quality standards; and (3) to preserve, protect, and enhance the air quality in areas of special natural recreational, scenic, or historic value, such as national parks and wilderness areas.

States are required to develop SIP revisions for PSD pursuant to regulations published today. *See* 40 CFR 51.24, "Requirements for Preparation, Adoption and Submittal of Implementation Plans." If EPA approves the proposed PSD plan, the state can then implement its own program. In the absence of an approved state PSD plan, another portion of today's regulations will govern PSD review. *See* 40 CFR 52.21, "Approval and Promulgation of Implementation Plans." EPA will implement this regulation itself if the state does not submit an approvable PSD program of its own.

States can identify in their SIPs the local land use goals for each clean area through a system of area classifications. A "clean" area is one whose air quality is better than that required by the National Ambient Air Quality Standards. Each classification differs in the amount of growth it will permit before significant air quality deterioration would be deemed to occur. Significant deterioration is said to occur when the amount of new pollution would exceed the applicable maximum allowable increase ("increment"), the amount of which varies with the classification of the area. The reference point for determining air quality deterioration in an area is the baseline concentration, which is essentially the ambient concentration existing at the time of the first PSD permit application submittal affecting that area. To date, only PSD increments for sulfur dioxide and particulate matter have been established. Increments or alternatives to increments are currently under investigation for the other criteria pollutants.

There are three types of area classifications. Class I areas have the smallest increments and thus allow only a small degree of air quality deterioration, while Class II areas can accommodate normal well-managed industrial growth. Class III designations have the largest increments and are appropriate for areas desiring a larger amount of development. In no case would the air quality of an area be allowed to deteriorate beyond the National Ambient Air Quality Standards. Except for certain wilderness areas and national parks, which are mandatory Class I areas, all clean areas of the country were initially designated as Class II. Flexibility exists under the Act to adjust most of these designations, except for those mandated by Congress.

The principal mechanism within the SIP to implement the objectives of the PSD program is the preconstruction review process. These provisions require that new major stationary sources and major modifications are carefully reviewed prior to construction to ensure compliance with the National Ambient Air Quality Standards, the applicable PSD air quality increments, and the requirements to apply the best available control technology on the project's pollutant emissions. In addition, proposed SIP relaxations which would limit further use of increment must be reviewed for their anticipated impact and not be approved if the applicable increment would be violated. The SIP must also contain PSD provisions for periodically reviewing all emissions increases, including those which occur outside the SIP revision and the new source review (NSR) process, and for restoring clean air when such increases cause violations of the applicable PSD increment. This corrective action may require additional controls on existing emissions sources which contribute to the problem.

B. Who is Subject to the Prevention of Significant Deterioration Regulations?

The requirements of today's PSD regulations apply to major stationary sources and major modifications which meet certain criteria concerning the geographic location, type of pollutants to be emitted, and timing of proposed construction. No source or modification subject to today's rules may be constructed without a permit which states that the stationary source or modification would meet all applicable PSD requirements. This section summarizes how PSD review as modified in response to *Alabama Power* will apply.

The primary criterion in determining PSD applicability is whether the proposed project is sufficiently large (in terms of its emissions) to be a major stationary source or major modification. Source size, for applicability purposes, is defined in terms of "potential to emit." "Potential to emit" means the capability at maximum design capacity to emit a pollutant after the application of all required air pollution control equipment and after taking into account all federally enforceable requirements restricting the type or amount of source operation. A "major stationary source" is any source type belonging to a list of 28 source categories which emits or has the potential to emit 100 tons per year or more of any pollutant subject to regulation under the Act, or any other source type which emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tons per year. A stationary source generally includes all pollutant-emitting activities which belong to the same industrial grouping, are located on contiguous or adjacent properties, and are under common control. Pollutant activities which belong to the same major group as defined in a standard industrial classification scheme developed by the Office of Management and Budget are considered part of the same industrial grouping. (*See* SOURCE).

A "major modification" is generally a physical change in or a change in the method of operation of a major stationary source which would result in a significant net emissions increase in the emissions of any regulated pollutant. In determining if a proposed increase would cause a significant *net* increase to occur, several detailed calculations must be performed. First, the source owner must quantify the amount of the proposed emissions increase. This amount will generally be the potential to emit of the new or modified unit. Second, the owner must document and quantify all emissions increases and decreases that have occurred or will occur contemporaneously (generally within the past five years) and have not been evaluated as part of a PSD review. The value of each contemporaneous decrease and increase is generally determined by subtracting the old level of actual emissions from the new or revised one. Third, the proposed emissions changes and the unreviewed contemporaneous changes must then be totalled. Finally, if there is a resultant *net* emissions increase that is larger than certain values specified in the regulations, the modification is major and subject to PSD review.

Certain changes are exempted from the definition of major modification. These include: (1) routine maintenance, repair, and replacement; (2) use of an alternative fuel or raw material by revision of an order under sections (2)(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation); (3) use of an alternative fuel by reason of an order or rule under section 125 of the Clean Air Act; (4) use of an alternative fuel at a steam generating unit to the extent it is generated from municipal solid waste; (5) use of an alternative fuel which the source is capable of accommodating; and (6) an increase in the hours of operation, or the production rate. The last two exemptions can be used ony if the corresponding change is not prohibited by certain permit conditions established after January 6, 1975.

If a source or modification thus qualifies as major, its prospective location or existing location must also qualify as a PSD area, in order for PSD review to apply. A PSD area is one formally designated by the state as "attainment" or "unclassifiable" for *any* pollutant for which a national ambient air quality standard exists. This geographic applicability test does not take into account what new pollutant emissions caused the construction to be major. It looks simply at whether the source is major for any pollutant and will be located in a PSD area.

Once a source applicant has determined that proposed construction falls under PSD based on the above size and location tests, it must then assess whether the pollutants the project would emit are or are subject to PSD. If a new major stationary source emits pollutants for which the area it locates in is designated nonattainment, then the source is exempt from PSD review for those pollutants. These sources must, however, meet the applicable requirements of NSR for each nonattainment pollutant. Similarly, if a major modification to be constructed in a PSD area involves changes only for nonattainment pollutants then the source is not subject to PSD. These modifications must meet the appropriate nonattainment NSR under the SIP for the pollutant. Once the question of NSR jurisdiction is resolved, then the PSD review applies to all signficant emissions increases of regulated air pollutants. Specific numerical cutoffs which define what emissions increases are "significant" have been spelled out in the regulations. These pollutant-specific cutoffs can exempt a source from PSD review for a particular pollutant, except where the proposed construction would adversely impact a Class I area.

If a proposed source or modification would be subject to PSD review based on size, location, and pollutants emitted, then its construction schedule must meet certain tests before the PSD rules promulgated today would apply. All major construction otherwise qualifying for PSD review would not need a PSD permit under these regulations if the proposed construction: (1) was subject to the old PSD rules, has submitted a complete application under these rules before today, and was or is subsequently approved to construct based on this application; or (2) was not subject to the old PSD rules, has received all federal, state, and local air permits needed before today and commences construction in a continuous fashion at the proposed site within a reasonable time.

Finally, the PSD regulations contain some specific exceptions for some forms of source construction. The requirements of today's regulations do not apply to any major stationary source or major modification that is: (1) a nonprofit health or educational institution (only if such exemption is requested by the governor); or (2) a portable source which has already received a PSD permit and proposes relocation.

C. What Must A Source or Modification Do To Obtain A PSD Permit?

1. It must apply the best available control technology.

Any major stationary source or major modification subject to PSD must conduct an analysis to ensure application of best available control technology (BACT). During each analysis, which will be done on a case-by-case basis, the reviewing authority will evaluate the energy, environmental, economic and other costs associated with each alternative technology, and the benefit of reduced emissions that the technology would bring. The reviewing authority will then specify an emissions limitation for the source that reflects the maximum degree of reduction achievable for each pollutant regulated under the Act. In no event can a technology be recommended which would not meet any applicable standard of performance under 40 CFR Parts 60 and 61.

In addition, if the reviewing authority determines that there is no economically reasonable or technologically feasible way to accurately measure the emissions, and hence to impose an enforceable emissions standard, it may require the source to use source design, alternative equipment, work practices or operational standards to reduce emissions of the pollutant to the maximum extent. For example, if an immense pile of uncovered coal emits coal dust into the atmosphere, it woud make little sense to impose an emission, standard, since measuring the amount of coal dust rising off the pile is nearly impossible. A much more direct approach to controlling emissions is, for example, requiring the owner to wet the coal pile daily. This type of standard or practice will be equivalent to an emissions limitation for purposes of the BACT requirement.

2. It must conduct an ambient air quality analysis.

Each PSD source or modification must perform an air quality analysis to demonstrate that its new pollutant emissions would not violate either the applicable NAAQS or the applicable PSD increment. This analysis ensures that the existing air quality is better than that required by national standards and that baseline air quality will not be degraded beyond the applicable PSD increment.

Each proposed major construction project subject to PSD must first assess the existing air quality for each regulated air pollutant that it emits in the affected area. This analysis requirement does not apply to pollutants for which the new emissions proposed by the applicant would cause insignificant ambient impacts. Today's PSD regulations define pollutant-specific impacts that are typically considered inconsequential and that can be exempted from analysis, unless existing air quality is poor or adverse impacts to a Class I area are in question. For pollutants for which a NAAQS exists, the applicant must provide ambient monitoring data that represent air quality levels in the year's period preceding the PSD application. Where no existing data are judged representative or adequate, then the source applicant must conduct its own monitoring program. This is often the case where the applicant will be establishing the baseline concentration for the affected area. Typically air quality dispersion modeling is used by applicants to support or extend the assessment made with gathered monitoring data. For pollutants for which there is no NAAQS, the required analysis will normally be based on dispersion modeling alone.

Source applicants who are subject to the ambient analysis requirement for sulfur dioxide or particulate matter must also perform an analysis to compute how much of the PSD increment remains available to them. In general the amount of increment that is available depends on certain changes in actual emission. First, actual emissions changes occurring after January 6, 1975 which are associated with physical changes or changes in the method of operation at a major stationary source can affect the available increment. Accordingly, cleanup adds to the available growth margin while new emissions diminish it. Second, all changes in emissions, including those from minor sources and other types of changes at major sources, affect the available increment provided they occur after the baseline date. The baseline date is essentially the time that the first PSD application affecting the area is filed.

Once the question of how much increment remains is resolved, then the applicant must demonstrate that his proposed new emissions would not exceed the remaining PSD increment. Where a proposed project would cause a new violation of the increment or contribute to an existing violation, it cannot be approved. Existing violations must be entirely corrected before PSD sources which affect the area can be approved.

3. It must analyze impacts to soils, vegetation, and visibility.

An applicant is required to analyze whether its proposed emissions increases would impair visibility, or impact on soils or vegetation. Not only must the applicant look at the direct effect of source emissions on these resources, but it also must consider the impacts from general commercial, residential, industrial and other growth associated with the proposed source or modification. The results of this analysis may be used to determine if the project would have an adverse impact on a Class I area.

4. It must not adversely impact a Class I area.

If the reviewing authority receives a PSD permit application for a source that could impact a Class I area, it will immediately notify the Federal Land Manager and the federal official charged with direct responsibility for managing these lands. These officials are responsible for protecting the air quality-related values in Class I areas and for consulting with the reviewing authority to determine whether any proposed construction will adversely affect such values. If the Federal Land Manager demonstrates that emissions from a proposed source or modification would impair air quality-related values, even though the emissions levels would not cause a violation of the allowable air quality increment, the Federal Land

Manager may recommend that the reviewing authority deny the permit.

5. Its application must undergo adequate public participation.

The regulations solicit and encourage participation by the general public, industry, and other affected persons impacted by the proposed major source or major modification. Specific public notice requirements and a public comment period are required before the PSD review agency takes final action on a PSD application. The public notice must indicate whether the reviewing authority proposed permit approval, denial, or conditional approval of a proposed major source or major modification. Consideration is given to all comments received provided they are relevant to the scope of the review. Where requested, or at its own discretion, the reviewing authority may conduct a public hearing to help clarify the issues and obtain additional information to assist in making a final permit decision.

6. It must start construction on time.

The source owner, once receiving a PSD permit, must start construction within a reasonable period of time (typically within 18 months of approval) and must stay on a continuous construction schedule. Normally, long delays will invalidate the permit.

II. Background

On August 7, 1977, the President signed the Clean Air Act Amendments of 1977 (1977 Amendments) into law. Those amendments established, in the form of Part C of Title I of the Clean Air Act (CAA), a set of requirements for the prevention of significant deterioration (PSD) of air quality in "clean air" areas. Sections 160–69, 42 U.S.C. 7470–79. The requirements for preconstruction review of new stationary sources and modifications in Part C follow the outline of the PSD regulations that EPA promulgated in 1974, but are more elaborate and in many ways more stringent. Part C also requires that each state implementation plan (SIP) contain the new PSD requirements.

In response to Part C, EPA promulgated two sets of PSD regulations on June 19, 1978. One set specified the minimum requirements that a PSD SIP revision would have to contain in order to warrant EPA approval. *See* 43 FR 26380 (codified at 40 CFR 51.24 (1979)) (hereinafter, the "1978 Part 51 regulations") The other set comprehensively amended the 1974 PSD regulations, incorporating into them the new Part C requirements. 43 FR 26388 (codified at 40 CFR 52.21 (1979)) (hereinafter, the "1978 Part 52 regulations"). EPA intended that, until it had approved a PSD SIP revision for a state, the permitting of new sources and modifications for PSD purposes would continue under the 1978 Part 52 regulations.

On June 18, 1979, the United States Court of Appeals for the District of Columbia Circuit issued a decision that upheld some of the substantive provisions of both the 1978 Part 51 and Part 52 regulations and overturned others. *Alabama Power Company v. Castle*, 13 ERC 1225. In its opinion, the court merely summarized its holdings, but promised to issue supplemental opinions after it had considered any petitions for reconsideration. In an order that accompanied the summary opinion, the court stayed the effect of its decision until it had issued the supplemental opinion. The purpose of that procedure, the court explained, was "to enable EPA to proceed as soon as possible to commence rulemaking or other proceedings necessary to promulgate those revisions in the PSD regulations required by [the court's] rulings * * *." *Id.* at 1227.

By a notice that appeared in the Federal Register for September 5, 1979, EPA began the process the court had in mind. 44 FR 51924. There EPA proposed various amendments to the PSD regulations that were to replace the provisions the court had held invalid, for instance, the definitions of "source," "modification," and "potential to emit." EPA also proposed amendments that were to add entirely new provisions to supplement the replacement provisions, for instance, the *de minimis* exemptions.

Prior to September, EPA had issued, also in response to the 1977 Amendments, various regulations and guidelines relating to the construction of new sources and modifications in and near "nonattainment" areas. In January 1979, the Agency revised its Emission Offset Interpretative Ruling ("Offset Ruling"), which now appears at 40 CFR Part 51, Appendix S (1979). Then, in April 1979, EPA issued a guideline entitled "General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas." 44 FR 20372.[1] Finally, in July 1979, EPA issued an interpretative rule concerning certain statutory restrictions on new construction in nonattainment areas. 44 FR 38471 ("construction moratorium").[2] EPA also asked for comment on certain issues concerning new construction in such areas. 44 FR 38583.

In the September Federal Register notice, EPA also proposed various changes to those nonattainment regulations and guidelines. The purpose of those changes generally was to conform those regulations and guidelines to the decisions in *Alabama Power* concerning the statutory terms "source," "modification," and "potential to emit."

On September 18, 1979, EPA announced that it would hold public hearings on the September proposal on October 15 and 16 in Washington, D.C., and on October 18 and 19 in San Francisco. *See* 44 FR 54069. At the same time, the Agency set November 18 as the deadline for submitting information rebutting or supplementing any presentation at the hearings. Subsequently, EPA held the public hearings as scheduled.

On October 4, 1979, EPA announced various corrections to technical errors in the September proposal. 44 FR 57107. At the same time, it extended the period for submitting written comments until November 5, 1979. It added that it would hold the rulemaking docket open until November 18, 1979, not only for information rebutting or supplementing any presentation at the hearings, but also for information rebutting or supplementing any written comment.

On November 9, 1979, EPA announced that it had recently released for public comment a draft of a revision of the *Ambient Monitoring Guideline for Prevention of Significant Deterioration (PSD)* (OAQPS 1.2–096), which the Agency had originally published in May 1978. 44 FR 65084. EPA also announced that it would accept any written comments on the draft until December 10, 1979.

On December 14, 1979, the Court of Appeals handed down its final opinion in *Alabama Power*. 13 ERC 1993. Subsequently, in order to avoid the uncertainty and confusion that would occur in PSD permitting if the final opinion came into effect before EPA completed the rulemaking, EPA and many of the other parties to the litigation petitioned the court to keep the final opinion from coming into effect until June 2, 1980. On March 14, 1980, the court granted the request.

On May 30, 1980, EPA and other parties to the litigation again petitioned the court, requesting a further extension of time until July 18, 1980. The court granted an extension, to July 28, on June 23, 1980.

On January 30, 1980, EPA announced that it would reopen the rulemaking docket for the receipt of written comments on various aspects of the rulemaking, including the final opinion of the court, certain issues that the Agency described in the notice, the redraft of the monitoring guidelines, and various meetings between EPA and others. 45 FR 6802.

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[1] For supplements to the General Preamble, *See* 44 FR 38583 (July 2, 1979); 44 FR 50371 (August 28, 1979); 44 FR 51924, 51928–29 (September 5, 1979); 44 FR 53761 (September 17, 1979); and 44 FR 67182 (November 23, 1979).

[2] For a fuller description of those nonattainment regulations and guidelines, *See* 44 FR 51925 and 45 FR 31304–05.

On February 5, 1980, EPA issued a stay of the 1978 Part 52 PSD regulations as to certain sources and modifications. 45 FR 7800. The stay was effective as of January 30, 1980. Its purpose was "to relieve from the permitting requirements of the 1978 PSD regulations roughly those sources and modifications that would not be subject to the permitting requirements of valid replacement regulations that would comport with the *Alabama Power* opinion." *Id.*

On May 13, 1980, EPA promulgated a stay of the Offset Ruling and the construction moratorium that is similar to the PSD stay. *See* 45 FR 31304. On the same day, EPA promulgated certain amendments to the Offset Ruling, the regulations relating to new source review at 40 CFR 51.18, and the construction moratorium. Those amendments established the geographic applicability of the various nonattainment requirements relating to the construction of new sources and modifications. 44 FR 31307. Those amendments embody EPA's responses to many of the comments on the September proposal.

Finally, on May 19, 1980, EPA promulgated regulations aimed at consolidating and unifying various permit requirements and procedures. 45 FR 33290. Those new regulations contain provisions which will govern the processing of applications for permits under the new Part 52 PSD regulations.

During the course of the rulemaking that EPA began in September, it received approximately 375 written comments. The discussion that follows summarizes the proposals, the comments on them, EPA's responses, and the final provisions.

III. Highlights

Several significant changes from the September 5, 1979 proposal have occurred. These changes include the addition of certain provisions not addressed by the September 5, 1979 proposal but which are necessary under the Act. Several regulatory provisions which are unchanged in substance by today's notice have also been reprinted to clarify the effects of any revised paragraph numbering.

A. *Transition:* The proposed transition scheme for phasing in the additional monitoring requirements has been expanded to require no new monitoring requirements for PSD applications submitted and complete within 10 months of the promulgation date. In addition, today's rules allow less than a full year of monitoring data to be included with PSD applications filed after the above times but before 18 months after the promulgation date. PSD applications filed later than 18 months from the date of promulgation will be subject to the full new monitoring requirements.

B. *Potential To Emit:* Potential to emit is the maximum design capacity of the source, except as constrained by federally enforceable permit conditions. This would include permit conditions restricting hours or type of source operation.

C. *50-Ton Exemption:* Today's regulations essentially delete the "50-Ton Exemption" for both nonattainment and PSD. The eligibility date for the section 165(b) exemption has been changed from August 7, 1977 to March 1, 1978.

D. *Fugitive Emissions:* For the purpose of PSD and nonattainment, "fugitive emissions" now means those emissions released directly into the atmosphere, which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions are not to be considered in determining whether a source would be a major source, except when such emissions come from specified source categories.

E. *Fugitive Dust:* Today's regulations promulgate the proposed deletion of the "fugitive dust exemption" from the applicable provisions of both PSD and the Offset Ruling.

F. *Stationary Source:* The definition of source for PSD purposes has been made more liberal than the previous regulations. Under today's rules, a PSD source is a grouping of all pollutant emitting activities at one location and owned or under the control of the same person or persons. This generally relates to the common notion of a plant. Smaller portions of such a plant no longer will be examined for applicability purposes. For added clarification, pollutant-emitting activities will now be considered part of the same "plant" if they belong to the same "major group" as described in the Standard Industrial Classification Manual. At this time, however, the Agency has decided not to change its previous approach to defining source for nonattainment purposes. Therefore, today's rules continue to incorporate the "dual definition" concept of source which requires consideration of overall emissions from a "plant" and from each "installation" within that plant. In a change from the proposal, this dual definition will apply to major sources in all nonattainment areas designated under section 107 of the Act, regardless of SIP approvability or degree of completion.

G. *Modification:* The definition and treatment of modifications have been changed since the September 5, 1979 proposal. The concept of accumulating minor changes made at an existing minor source until the sum was equivalent to a major stationary source has been deleted. Rather, a source must now qualify as a major stationary source prior to making a modification to become subject to review, unless the change itself is greater than 100 or 250 tons per year. Contemporaneous changes now generally refer to emissions increases and decreases occurring within the same 5-year time period unless the state opts for a different time period in its Part D SIP or PSD program. Reductions, to be creditable, must be enforceable under the SIP before the contemporaneous emission increase would begin construction. Such reductions, as well as significant increases, will be quantitatively assessed on the basis of an "actual emissions" baseline, rather than a "potential to emit" baseline, as was proposed. "Reconstruction" (*i.e.*, 50% or more capital replacement) has been deleted from PSD but has been retained for nonattainment NSR, including the prohibition on construction.

H. *"De Minimis" Exemptions:* Three types of changes from the September 5 proposal appear in today's regulations: (1) different numbers have been developed for defining significant emissions from new sources and significant net emissions increases from modifications; (2) new air quality *de minimis* numbers have been generated and can only be used to exempt PSD sources from the ambient monitoring requirements; and (3) a ten kilometer proximity cutoff has been specified to indicate when a source, regardless of pollutant emissions, must be prepared to demonstrate that no 24-hour impact greater than 1 $\mu g/m^3$ would occur in the Class I area.

I. *Geographic Applicability:* PSD will generally apply only if the otherwise subject major construction locates in a section 107 area which is designated attainment or unclassified under section 107 for any criteria pollutant (regardless of what pollutants the proposed construction would emit or what pollutant qualified it as major). An exception to this rule is that no PSD permit is required for major construction which emits only the pollutant for which the area of location is nonattainment.

J. *Pollutant Applicability:* Any net significant emissions increase of any pollutant subject to regulation under the Act (not just those pollutants for which the source is major) now qualifies as a PSD modification. Nonattainment review will continue to focus on only the major nonattainment pollutant. No PSD review will be required for a given criteria pollutant, if a source would construct in an area designated nonattainment for that pollutant.

K. *Baseline Area/Date:* Baseline area now refers to all section 107 areas which are designated attainment or unclassified for PM or SO_2 (as may be redesignated) in which the PSD source triggering the baseline date would locate or would have an annual air quality impact equal to or greater than 1 $\mu g/m^3$. Interstate impacts, however, do not trigger baseline date. This differs from the proposal, which focused on the AQCR rather than the designated area. Baseline dates are pollutant specific and can be established by the first PSD application of a source with significant emissions of the applicable pollutant. States will have the flexibility to redesignate clean or unclassified areas under section 107 and thereby remove baseline dates for certain areas. However, no redesignation may subdivide the impact area (>1 $\mu g/m^3$) of the source triggering a baseline date.

L. *Best Available Control Technology:* Today's regulations reflect the proposal with one exception. A provision has been added that requires BACT for modifications only when both a net emissions increase occurs at the changed unit(s) and a significant net emissions increase occurs at the plant; BACT applies only to the units actually modified.

M. *Monitoring:* The proposed transition scheme for phasing in the additional monitoring requirements will provide relief for sources covered under the existing regulations that are in the process of monitoring and offer allowances for setup time of monitors in gathering the required data.

N. *Notification:* The notification provisions appearing in the September 5, 1979 proposal have been deleted from today's regulations.

O. *PSD SIP Revisions:* The requirements proposed on September 5 for governing the development of PSD SIP submittals are essentially unchanged. These regulations allow limited flexibility in the development of different but equally effective state plans.

P. *Increment Consumption:* A discussion has been included in the preamble to summarize the effects that the *Alabama Power* decision has had on increment tracking. This section also discusses how certain SIP related issues are to be addressed, such as the Gulf Coast problem (SIP shows a theoretical increment violation in a clean area, unrelated to actual air quality impact) and temporary SIP relaxations. (SIP would be relaxed and only temporary emissions would occur.)

Q. *Public Participation:* The requirements of paragraph (r) of § 52.21 have been replaced with the public participation procedures associated with the consolidated permit regulations (40 CFR 124).

IV. Transition

This section focuses on those provisions of the final PSD and nonattainment regulations which govern the transition from the preexisting requirements to the new ones. It begins with a discussion of the new transition provisions of the Part 52 PSD regulations and then deals in turn with the transition provisions of the Part 51 PSD regulations, the Offset Ruling, the Part 51 nonattainment regulations, and finally the construction moratorium.

A. Part 52 PSD Regulations

The new transition provisions of the Part 52 PSD regulations fall into three categories: those that relate to the new coverage of the regulations, those that relate to the new requirements for best available control technology (BACT) and air quality assessments, and those that relate to the new procedural requirements. The discussion which follows deals with each in that order.

1. *Coverage.*

a. *Proposed transition provisions:* The preconstruction permit requirements of the 1978 Part 52 regulations applied to a certain class of projects that emit or would emit pollutants. The keystone of those regulations, section 52.21(i)(1), provided that "[n]o major stationary source of major modification shall be constructed unless the [permit] requirements of [the Part 52 regulations] have been met." It established the general rule that the permit requirements applied to any "major stationary source" or "major modification." The balance of section 52.21(i) then listed certain exceptions to that general rule. The main exceptions established various "grandfather" exemptions. The permit requirements of the regulations applied, therefore, to any pollutant-emitting project that was "major" and had no "grandfather" status.

In September 1979, EPA proposed to establish new Part 52 PSD regulations whose coverage would be substantially different from that of the 1978 regulations. First, it proposed to define "major stationary source" differently than it had defined that term in the 1978 regulations. Under the 1978 regulations, whether a "source" was "major" depended upon whether its "potential to emit" any pollutant regulated under the Act would equal or exceed certain thresholds. "Potential to emit" referred largely to the maximum rate at which a "source" would emit a pollutant *without* control equipment. Under the amendments that EPA proposed in September, "potential to emit" would be the maximum rate at which a "source" would emit a pollutant *with* control equipment. Second, EPA proposed to define "major modification" differently than it had defined that term in the 1978 regulations. There, a "major modification" was any change at a "source" that would increase the "potential to emit" of the "source" by 100 tons per year of any pollutant regulated under the Act, or 250 tons per year, depending on source type and ignoring any emission reductions. Under the amendments that EPA proposed in September, "major modification" would have become any change at a "source" that would result in a *significant net* increase in the "potential to emit" of the "source." "Significant" is defined as emissions greater than certain *de minimis* values. Finally, EPA proposed to limit the geographic applicability of the PSD permit requirements by adding an exception to section 52.21(i) that would exclude a "source" or "modification" from PSD review on the basis of its location.[3]

Amendments of the sort that EPA proposed in September would have left many projects that previously fell or would have fallen within the coverage of the 1978 Part 52 regulations outside the coverage of the resulting Part 52 regulation. For instance, many new "sources" that were "major" under the 1978 regulations would not have been "major" under the proposed amendments, because while their maximum uncontrolled emissions would exceed the applicable thresholds, their maximum controlled emissions would not.

Of those projects that were or would have been subject to the PSD permit requirements under the 1978 PSD regulations, but not under the proposed amendments, some have already received a PSD permit, while others have not. In September, EPA proposed to put both sets of projects outside the reach of the permit requirements as soon as possible by putting the new definitions of "potential to emit" and "modification" and the new limitation on geographic applicability into effect immediately upon their promulgation. *See* 44 FR 51927. But EPA also proposed that any permit that had already been issued would remain in effect, binding and particular project to its terms, until the permit had been rescinded under a proposed paragraph (w) or had expired under an existing paragraph (s). *See id.* at 51927, 51956. Under paragraph (w), a permittee would have been able to obtain rescission only if the permittee filed a complete application with the issuing authority within 90 days after paragraph (w) had come into effect.

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[3] Specifically, EPA proposed that the permit requirements would apply only to any "major stationary source" or "major modification" that would be located in an area designated under section 107 of the Act as attainment or unclassifiable for a pollutant for which the "source" or "modification" would be major or would significantly impact an area in another state which is designated as attainment or unclassifiable for any such pollutant.

Amendments of the sort that EPA proposed in September would also have brought some projects that previously fell or would have fallen outside the coverage of the 1978 regulations inside the coverage of the Part 52 regulations. For instance, many changes at a "source" that would result in a *gross* increase in "potential to emit" well below 100 or 250 tons per year might nevertheless result in a significant net increase.

In September, EPA proposed to exempt from PSD review certain of these projects that fell or would have fallen beyond the reach of the PSD permit requirements under the 1978 regulations, but not under the proposed amendments. In particular, EPA proposed to "grandfather" any such project which before the promulgation of the new amendments had received each preconstruction permit that the state implementation plan (SIP) required and which will have "commenced" construction within 18 months after promulgation. *See id.* at 51928 (first column), 51953 (proposed § 52.21(i)(7);) 44 FR 57108 (items B(1) and (C)(2)).

Finally, EPA proposed to add another new grandfather provision to § 52.21(i). That provision would have stated that the permit requirements of those regulations do not apply to any "source" or "modification" on which construction "commenced" before August 7, 1977, the date of enactment of the 1977 Amendments. *See id.* at 51928 (first column), 51953 (proposed § 52.21(i)(3)). The purpose of the proposal was merely to state in regulatory form what section 168(b) of the Act, 42 U.S.C. 7478(b), already provides.

b. *Comments and final action on the proposed transition provisions relating to coverage:* EPA received no comments on its proposal to put the new definitions of "potential to emit" and "modification" and the new limitation on geographic applicability into effect immediately upon promulgation. EPA therefore has put those provisions into effect as of the date this notice appears in the Federal Register. Some projects that were within the coverage of the 1978 Part 52 regulations, but have yet to receive a PSD permit, are now outside the coverage of the new Part 52 regulations, since the prohibition on construction without a permit in § 52.21(i)(1)(i) no longer applies to them. As a result, construction on them may begin immediately.[4] Because further delay is pointless, and might be harmful in some cases, EPA finds that it has "good cause" to put the new applicability provisions into effect immediately upon promulgation, within the meaning of section 4(d)(3) of the Administrative Procedure Act (APA), 5 U.S.C. 553(d)(3). *See also* APA 4(d)(1), 5 U.S.C. 553(d)(1).

EPA did receive numerous comments on its proposal to rescind certain permits, and to treat them as binding unless and until rescinded. While one commenter agreed with the proposal, most did not. They objected primarily to two aspects of the proposal: first, that it would place on the permittee the dual burden of coming forward with an application for rescission and of providing proof that the project in question does fall outside the coverage of the new Part 52 regulations and, second, that it would bar rescission if the permittee failed to file a complete application within a certain period of time. The commenters argued that EPA had no authority originally to require a permit for any project that falls outside the coverage of the new regulations and that it therefore has no authority now either to place the burden of coming forward and of proof on a permittee or to keep a rescindable permit in effect merely because of a failure to file a complete application for rescission by a certain time.

In response, EPA has promulgated a new provision, § 52.21(w), which does place the burden of coming forward and of proof on the permittee, but imposes no deadline for filing an application. Whether EPA had authority originally to require a permit for a project that falls outside the coverage of the new regulations is immaterial. EPA has authority under section 301(a)(1) of the Act, 42 U.S.C. 7601(a)(1), to fashion within reason the regulatory tools it needs to carry out its tasks. Here EPA has undertaken not only to release certain PSD permittees from the constraints of their PSD permits, but also to settle as finally, as publicly, and as quickly as possible which old permits are binding and which are not. Prospective applicants, in order to prepare applications, and permitting authorities, in order to meet their obligations under the PSD regulations, must assess increment consumption. Confusion and uncertainty over whether particular projects are subject to the emissions limitations in their PSD permits can only frustrate efforts to assess increment consumption. New § 52.21(w) maximizes EPA's ability to perform satisfactorily the tasks it has undertaken.

First, by stating explicitly that a permit generally remains in effect until rescinded, § 52.21(w) gives each permittee with a rescindable permit a strong reason to bring it before the reviewing authority as soon as possible. Second, by putting the burdens of coming forward and of proof on the permittee, § 52.21(w) ensures that the reviewing authority will spend its time efficiently and will have adequate information with which to make a sound decision. Third, by establishing that only the reviewing authority may rescind a permit, the provision promotes the soundness and therefore the finality of the rescission, since the reviewing authority will have the expertise and objectivity necessary to check adequately whether the permittee has applied the intricate applicability rules correctly. Finally, by requiring that the reviewing authority publish each rescission, § 52.21(w) ensures that the status of each permit will be in the public record.

Certain commenters suggested two alternatives to EPA's proposed rescission provision. One alternative was to declare upon promulgation that any PSD permit for a project that falls outside the coverage of the new regulations is null and void as of that time, but that any permittee which concludes it holds such a permit must send the reviewing authority a bare notice of that conclusion. The other alternative was to require any such permittee to send the reviewing authority an application for rescission and to establish that the failure of the reviewing authority to act on the application within a certain period would operate to grant the application. EPA has decided to adopt neither alternative. Under both, a project that should not be able to escape PSD constraints would be able to escape them merely because of an oversight or a manpower deficiency. EPA, however, has no authority to allow escape from review on that basis.

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[4] The partial stay of the 1978 regulations that EPA issued in January 1980 has probably already relieved most of those projects from the permit requirements of those regulations.

Certain commenters also objected to other aspects of the proposed rescission provision. In particular, one commenter asserted that proposed § 52.21(w)(3), which would say that "[t]he permitting authority may approve" an application that does show that the permit is rescindable, should state instead that "[t]he permitting authority *shall* approve" such an application. (Emphasis added.) EPA agrees, and has placed the necessary mandatory language in the final provision. Other commenters urged that the final provision recognize the possibility that a permittee may wish to obtain rescission of only certain elements of a permit. In response, EPA has introduced language under which the reviewing authority may rescind only certain elements, if that is appropriate in the particular case.

With respect to the rescission provision, it should be noted that rescission of a permit would in no way affect any other limitations on the project that may apply by virtue of the SIP or a state permit. It should also be noted that, if a source or modification whose permit is rescinded were later found to be causing or contributing to an increment violation, additional controls might be necessary. *See* 40 CFR 51.24 (a)(3)(1979).

EPA received many comments on its proposal to "grandfather" certain projects that fall outside the coverage of the 1978 regulations, but not the new Part 52 regulations. Two commenters, while not focusing specifically on that proposal, expressed general opposition to "grandfathering" any project that would otherwise fall within the coverage of the new regulations. In its view, EPA should adhere to the transitional rules that it established in the 1978 regulations, so that in general a project would escape PSD review under the new Part 52 regulations only if certain permits were obtained for it by March 1, 1978, and construction "commenced" on it by March 19, 1979.

EPA disagrees that it should or must adhere to the transitional rules in the 1978 regulations in deciding which of the projects in question here should have to get a PSD permit. Part C of Title I of the Act contains two provisions, sections 165(a) and 168, which describe how the PSD permit requirements of Part C are to be implemented. Those sections, however, contradict each other irreconcilably. *See Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 851–54, 860–73 (D.C. Cir., 1979). EPA has authority under section 301(a)(1) of the Act, therefore, to set transitional rules which accommodate reasonably the purposes and concerns behind the two contradictory provisions. *See id.* at 873–74.

The court in *Citizens to Save Spencer County* identified those "considerations" as follows:

> (1) enhanced protection of the environmental quality of the nation's air; (2) minimization of economic dislocation and loss as a result of such enhanced protection; (3) a heightened enforcement role for states * * *; and (4) facilitation of an efficient administrative transition from enforcement of the "old" to "new" preconstruction review requirements. (*Id.* at 869 (footnotes omitted).)

Here, the proposed grandfather provision would reasonably accommodate those considerations. Most of the projects in question are modifications that would result in a significant net increase in the maximum controlled emissions of the "source," but not in a gross increase in uncontrolled emissions equal to or above 100 or 250 tons per year. This discrete group of small modifications, even in the aggregate, have a relatively minor effect on air quality. But, because they are numerous, delaying them by imposing new PSD requirements could frustrate economic development. The proposed provision would strike a rough balance between the benefits and the cost of applying PSD to those projects by allowing any company that has already obtained each of the preconstruction permits otherwise necessary under the SIP to proceed to construction without delay. To require such a company to obtain a PSD permit could mean substantial delays. To impose such delays here would be excessive.[8]

One commenter urged EPA to promulgate a grandfather provision that would use the date of complete application instead of the date of permit issuance. The commenter was concerned that the proposed provision would treat unfairly a company that obtained the last permit necessary under the SIP just a day or two after the date this notice appeared in the Federal Register. Use of such a date, however, might exempt many more projects from review. Hence, in EPA's view, it would fail to give adequate expression to the interests behind section 165, especially the goal of protecting air quality.

Certain commenters pointed out that a company might be unable to "commence construction" within the proposed 18-month period, because it might be unable to get sufficiently in advance any preconstruction permits that federal or state law outside the SIP might require. They recommended that EPA set the deadline 18 months from issuance of the last necessary federal authorization. That recommendation parallels a proposal EPA made in July 1979 to amend the grandfather provisions of the 1978 regulations so as to extend the "commence" construction deadlines in those provisions generally to a date nine months from the issuance of the last necessary federal authorization. *See* 44 FR 42722. EPA has not yet completed that rulemaking. When it does, it will decide whether to accept the recommendation of the commenters here.

EPA has decided to promulgate the grandfather provision basically as proposed. *See* § 52.21(i)(4)(v). The final provision contains the following clause: "the owner or operator * * * obtained all final federal, state and local preconstruction approvals or permits necessary" under the SIP by a certain date. EPA intends that clause to refer only to the date on which the reviewing authority issues the permit. For emissions increases as a result of SIP relaxations, the appropriate date is the effective date of final EPA approval. Because of the construction moratorium, 40 CFR 52.24, 44 FR 38471, some SIP permits may be issued before the time that the owner or operator is allowed to begin construction. Nevertheless, in EPA's view, the owner or operator "obtains" the permit when the reviewing authority issues it, even if permission to begin construction takes effect subsequently.

EPA received no comments on its proposal to put into regulatory language the provision in section 168(b) of the Act that only the PSD regulations in effect before August 7, 1977, apply to any project on which construction "commenced" by then. Hence, EPA is promulgating that provision basically as proposed. *See* section 52.21(i)(4)(i).

2. *Substantive Provisions Relating to BACT.*

a. *Proposed transition provisions:* In September, EPA proposed certain new substantive requirements. One of the new requirements was that a project apply BACT for each pollutant regulated under the Act that the project would emit in a significant, but "minor" amount. Under the 1978 Part 52 regulations, a project has to apply BACT only for each pollutant regulated under the Act that the project would emit in a

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[8] Even if the conflict between sections 165(a) and 168 had not conferred on EPA the discretion to exempt certain projects that would otherwise be subject to PSD review for the first time, EPA would have authority under section 301(a)(1) to exempt those projects in order to phase-in new requirements on a reasonable schedule.

"major" amount. EPA added that it intended to put the new BACT requirement into effect immediately upon its promulgation.

In proposing the new BACT requirement, EPA also proposed to exempt certain projects from it. In particular, the Agency proposed not to apply the requirement to any project whose application for a PSD permit was complete before the requirement came into effect. *See* 44 FR 51928, 51954 (proposed § 52.21(j)(2)).

b. *Comments and final action on proposed transition provisions relating to BACT requirements:* In general, those commenting on the proposal to grandfather any project whose application was complete before the date of publication of this notice from the new BACT requirement favored such an exemption for at least those projects. Only two commenters, the same two who opposed the grandfather provision discussed above, opposed such an exemption for any project. They argued that EPA should adhere to the transitional rules that it established in the 1978 regulations, so that the new BACT requirements would apply to any project that fell or would fall within the coverage of those regulations, even to those which have already received a PSD permit.

EPA disagrees that it should or must adhere to the 1978 transitional rules in applying the new BACT requirements. As discussed above, the court in *Citizens to Save Spencer County* held that EPA has a "responsibility to harmonize the statutory provisions [sections 165(a) and 168] so as to implement the congressional mandate that new federal preconstruction review requirements be instituted promptly but with minimum economic dislocation." 600 F.2d at 851. Requiring a company which has already received a permit, or completed application for one, to amend project designs and permit applications to include BACT for pollutants to be emitted in "minor" amounts would hardly minimize economic dislocation. To the contrary, it would delay construction substantially in many cases. The benefits of that delay in those cases would probably fail to counterbalance its cost, since the new BACT requirements would apply only to pollutants this discrete group of projects would emit in "minor" amounts. Thus, applying the new BACT requirements retroactively to projects that already have a permit or a complete application would fail to give adequate expression to the economic considerations behind section 168.

Another commenter argued that the proposal did not go far enough, in that it would require companies which on the date of promulgation were just about to file a complete application to amend project designs and applications. The commenter urged EPA to apply the new BACT requirement only to projects whose applications were not complete within one year after the date of publication of this notice in the Federal Register. That alternative, however, would fail to give adequate expression to the environmental considerations behind section 165(a). EPA therefore has rejected it, too.

Instead, EPA has decided to adopt a provision like the proposal which exempts from the new BACT requirements any project whose application was complete before this notice appears in the Federal Register. *See* § 52.21(i)(9). EPA believes that the final provision reasonably accommodates the purposes and concerns behind sections 165(a) and 168.[6]

The final provision differs from the proposed provision somewhat. First, it appears in paragraph (i), instead of paragraph (j), the provision that sets forth the general BACT requirement. EPA has sought to gather each of the exemption provisions into paragraph (i). Second, the new exemption provision exempts an eligible project from the new BACT requirement entirely, but adds that the project is subject to the BACT requirements of the 1978 regulations, if they would otherwise have applied. The purpose of that structure is in part to assure that BACT would apply to a pollutant for which the project would be "major" under the 1978 regulations, but "minor" under the new Part 52 regulations due to the new concepts of "potential to emit" and "modification."

The final Part 52 regulations contain a definition of the term "complete" in reference to an application. Under that definition an application becomes "complete" when it contains all of the information necessary for application processing.

It should be noted, finally, that the date an application was complete will generally differ from the date on which the reviewing authority makes its completeness determination, since the filing of the last necessary piece of information will typically occur before the determination is made. When EPA makes a completeness determination, it will specify the date as of which the application was "complete." That date will be the date on which the last necessary piece of information was received. One of the provisions of the Consolidated Permit Regulations, 40 CFR 124.3(f) (discussed below), refers to the "effective date" of an application. Generally, the "effective date" of an application will follow the date it is "complete."

3. *Substantive Provisions Relating to Air Quality Analyses.*

a. *Proposed transition provisions:* Another new substantive requirement that EPA proposed in September was that an applicant provide an analysis of air quality in the area the project would affect for each pollutant regulated under the Act that the project would emit in "minor," but still significant, amounts. Under the 1978 regulations, an applicant had to provide such an analysis only for those pollutants for which the project would be "major" and for which EPA had set a national ambient air quality standard (NAAQS). The remaining new requirement was that, if the project would emit particulate matter or sulfur dioxide in a significant amount, the analysis focus on the extent to which ambient concentrations of the particular pollutant had consumed the applicable PSD increments.

In proposing the new requirements for air quality analyses, EPA also proposed to exempt certain projects from them. In particular, EPA proposed not to apply the new requirements to any project whose application was complete before the requirements came into effect. *See* 44 FR 51928, 51954 (proposed § 52.21(n)(1)(i)).

The 1978 Part 52 regulations contained a requirement that any air quality analysis for a pollutant for which a NAAQS exists ("criteria pollutant") must generally include monitoring data gathered over and relating to the year preceding the submission of a complete application. In September, EPA proposed a reformulation of that requirement. That requirement, however, when coupled with the new requirement for an analysis for each criteria pollutant emitted in "minor" amounts, could cause a prospective applicant substantial delay. As a result, EPA also proposed to require any applicant who does not file a complete application before the date of promulgation to gather monitoring data for any such "minor" pollutant only over the period (up to one year) from the date of promulgation and the date the applicant would file an otherwise complete application. *See id.* at 51928, 51954 (proposed § 52.21(n)(1)(iii)).

b. *Comments and final action on transition provisions relating to air quality analysis requirements:* Two commenters argued that EPA should adhere to the transitional rules of the 1978 regulations with respect to the new requirements for air quality analyses. In their view, the monitoring requirements should apply in general to any "major" project for which certain permits were not obtained by March 1, 1978, and on which construction had not commenced by March 19, 1979. Certain other commenters objected to any application of the new monitoring requirements to a company which, although it had not filed a complete application by the date of promulgation, had nevertheless previously undertaken a program of monitoring the EPA or a state had approved.

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[6] Even if the conflict between sections 165(a) and 168 had not conferred on EPA the discretion to exempt projects with a complete application, EPA would have authority under section 301(a)(1) to exempt them, since applying the new BACT requirements to such projects would be unfair.

Some additional comments were directed to the proposed phase-in provision. Those comments contended that a prospective applicant would find it impossible to satisfy that provision, since the purchase, installation, and "debugging" of new monitoring equipment, together with the analysis of any new data, would require at least several months. Many commenters did note that the draft of the revision of the monitoring guideline would allow three months for those tasks, but asserted that even three months would generally be insufficient. See U.S. EPA, *(Draft) Ambient Monitoring Guidelines for Prevention of Significant Deterioration (PSD),* (October 1979). Some recommended an allowance of 2–5 months, others 6–9 months, and still others more than 10 months.

A number of commenters observed that the proposed regulatory language failed to embody the intent that the preamble had described. First, the proposed exemption for each "major" project whose application was complete before the date of promulgation focused only on the new requirement for an analyses for each pollutant that the project would emit in a "minor" amount. Hence, it would have failed to shield each such project from the new requirement for an analysis for each non-criteria pollutant that the project would emit in a "major" amount. Second, the provision that would have phased-in any new monitoring requirements focused only on projects whose applications were complete by the date of promulgation. Consequently, it specified no phase-in rules for projects whose applications were not complete by then, the very projects that EPA intended the rules to benefit.

Finally, one commenter pointed out an anomaly in the proposed phase-in provision: it focused only on the new requirement, in proposed § 52.21(n)(1)(iii), that an applicant provide monitoring data for any criteria pollutant that the project would emit in "minor" amounts. As a result, the proposed provision would have required a company with a project that is "major" under the new regulations, but was not under the 1978 regulations, to gather the full amount of monitoring data for each of its "major" pollutants, but none of its "minor" pollutants. But, since the monitoring requirements would have been new for the "major" pollutants, as well as the "minor" pollutants, such a company should have protection with respect to the "major" pollutants, too.

The final transition provisions relating to the new requirements for air quality analyses adhere to the spirit of the proposed provisions, but differ substantially in structure and articulation. One of the four final provisions, § 52.21(i)(9), exempts certain sources and modifications from the new requirements with respect to monitoring entirely. It provides that those requirements shall *not* apply to a source of modification that was subject to the 1978 Part 52 regulations, if its application becomes complete on or before the date this notice appears in the Federal Register. Instead, the air quality analysis requirements in the 1978 regulations apply to the source or modification.

Two of the three remaining provisions exempt certain other sources and modifications from the new monitoring requirements for criteria and non-criteria pollutants. One of those provisions, § 52.21(i)(10)(i), exempts a source or modification that would have been subject to the 1978 Part 52 regulations from those new monitoring requirements, if its application becomes complete with respect to the requirements of the new Part 52 regulations, other than the new monitoring requirements, on or before a date ten months from the date of promulgation. The provision adds the clarification that the monitoring requirements of the 1978 regulations apply instead to the source or modification. The other exemption provision, § 52.21(i)(10(ii), is similar. It exempts a source or modification that would not have been subject to the 1978 Part 52 regulations, if its application becomes complete with respect to the requirements of the New Part 52 regulations, other than those for monitoring, on or before a date ten months from the date this notice appears in the Federal Register.

The remaining provision, § 52.21(m)(1)(v), phases-in the monitoring requirements of new § 52.21(m)(1)(iv) to the extent that they place monitoring burdens on an applicant that the 1978 Part 52 regulations would not have imposed. Section (m)(1)(iv) provides in general that any required air quality analysis for a criteria pollutant must include monitoring data gathered over a period of at least one year. However, the new phase-in provision establishes the general rule that for certain applications the required monitoring data shall have been gathered over a period at least equal to the period from the date six months from the date of promulgation to the date the application becomes complete, except as to the monitoring requirements of the new Part 52 regulations. The applications to which this provision applies are those which become complete, except as to those monitoring requirements, between the date ten months from promulgation and the date eighteen months from promulgation. The new phase-in provision then states three exceptions to that general rule. First, an applicant with a project that would have been subject to the 1978 Part 52 regulations must provide at least whatever monitoring data the 1978 Part 52 regulations would have required the applicant to provide. Second, if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a shorter period (not to be less than four months), the required data may be gathered over at least that shorter period. Finally, if the monitoring data would relate exclusively to ozone and would not have been required under the 1978 regulations, the Administrator may waive the otherwise applicable requirements of the phase-in provision to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

The following example illustrates how the proposed phase-in provision works. A company proposes to construct a new plant that would emit sulfur dioxide and particulate matter. Under both the new Part 52 regulations and the 1978 regulations, the plant would be "major" for sulfur dioxide and "minor" for particulate matter. The emissions of particulate matter would not be *de minimis.* But for the phase-in provision, the new Part 52 regulations would require an application for a permit for the plant to contain a year's worth of monitoring data for both sulfur dioxide and particulate matter. (This assumes that the Administrator does not determine that a complete and adequate analysis could be accomplished with data gathered over a shorter period.)

The 1978 regulations would have required the application to contain a year's worth of data for just sulfur dioxide. The company submits an application which becomes complete, except with respect to monitoring, at the end of the fifteenth month after promulgation. Under the phase-in provision, the application must contain (1) a year's worth of monitoring data for sulfur dioxide and (2) nine months' worth of data for particulate matter.

The four final provisions embody EPA's response to the comments on the proposals. First, EPA has adopted the fundamental approach of the proposal, which was to apply the new monitoring requirements prospectively only. EPA has concluded that that approach reasonably accommodates the purposes and concerns of sections 165(a) and (e)(2), on the one hand, and section 168, on the other. In brief, the approach institutes the new requirements promptly, but with minimum economic dislocation. See *Citizens To Save Spencer County* v. *EPA*, 600 F.2d at 851. Full and immediate application of the new monitoring requirements would have caused substantial delays in the submission of complete applications and hence the issuance of permits, but provided little direct environmental benefit in return. As for applicants who undertook an approved program of monitoring before the date of this notice, the phase-in provision affords them adequate protection from delay, while at the same time generally demanding as much compliance with the new monitoring requirements as possible.[7] In short, EPA disagreed with the commenters who complained that the proposals would have instituted the new requirements too late, and with those who complained that the proposals would have instituted them too soon.

Second, with respect to the new monitoring requirements for criteria and non-criteria pollutants, EPA has established a grace period of ten months in the final grandfather provisions. It has done so because it agrees with the commenters who asserted that instituting a new monitoring program and analyzing the data it generates requires more than three months in many, if not most, circumstances. EPA has selected a grace period of ten months with respect to monitoring for both criteria and non-criteria pollutants, first, because six months is an estimate of the amount of time that would generally be needed to complete those tasks and, second, because there is little usefulness to less than four months of data for most pollutants.

The promulgated provisions cure the ambiguities in the proposal observed by some commenters. Section 52.21(i)(10) exempts an eligible project from the requirements relating, not only to any non-criteria pollutant that it would emit in "minor" amounts, but also to any non-criteria pollutant that it would emit in "major" amounts. In addition, the phase-in provisions now deal explicitly with projects whose applications were *not* complete by the applicable deadline. Finally, § 52.21(i)(10) protects not only projects that were subject to the 1978 regulations, but also projects that were not subject to them.

4. *Comments on the effective date of the substantive provisions.*

In proposing the new substantive provisions relating to BACT and air quality analyses the Agency stated that it intended to put those new provisions into effect immediately upon their promulgation. One commenter contended that EPA should put the new provisions into effect 30 days after promulgation, rather than immediately on the date of promulgation, so that "potential applicants [would have] sufficient lead time in planning modifications and new sources." With respect to the new provisions relating to air quality monitoring, the 10-month grace period and phase-in provision described above should satisfy the concerns of the commenter. With respect to the new BACT provisions, however, EPA disagrees. Prospective applicants have had ample warning of the new BACT provisions. The court in *Alabama Power* held in June of 1979 that Congress intended them to be imposed and in September 1979 EPA specified when it intended to impose them. Therefore, there is good cause to make these requirements immediately effective. The Administrative Procedure Act (APA), moreover, would not require a 30-day delay in implementation, since the provisions amount to legal interpretations. *See* APA section 4(d)(2), 5 U.S.C. section 553(d)(2).

5. *New Provisions Governing Procedure.*

EPA recently promulgated regulations aimed at consolidating and unifying various permit requirements and procedures. *See* 45 FR 33290 (May 19, 1979) (the "Consolidated Permit Regulations"). Those new regulations contain provisions which will govern the processing of applications for permits under the Part 52 PSD regulations. Those provisions appear as 40 CFR 124.1–124.21 and 124.41–124.42, 45 FR 33485-92. Paragraph (r) of the 1978 Part 52 regulations has governed the processing of PSD permit applications under those 1978 regulations.

The Consolidated Permit Regulations contain a provision, section 124.21, which describes the transition from the procedures of paragraph (r) to the new consolidated permit procedures. It provides that those new procedures shall "apply to PSD proceedings in progress on July 18, 1980." 45 FR 33492. It adds that the requirements of sections 124.9 and 124.18, which would require the preparation of a formal administrative record, shall apply only to "PSD permits for which draft permits [*i.e.*, preliminary determinations] were prepared after the effective date of these regulations." *Id.*

In promulgating the new Part 52 regulations, EPA has adopted a new paragraph (q). It states that the new consolidated permit procedures govern the processing of PSD permit applications to the extent that they apply. It adds that the procedures of the 1978 Part 52 regulations continue to apply to the extent that the new procedures have not yet displaced them. In time, the new procedures will displace the old ones entirely.

B. Part 51 PSD Regulations

In September, EPA did not propose an amendments to the 1978 Part 51 regulations that paralleled the proposed Part 52 transition provisions. The Part 51 amendments that EPA did propose paralleled only the Part 52 provisions that would affect coverage and substance. The few comments that were submitted focused on this gap.

One commenter asked that EPA state in the Part 51 regulations that a state which has already adopted and obtained EPA approval of its own PSD program may, in conforming that program to the new Part 51 regulations, adopt a rescission provision like new § 52.21(w) into its plan. EPA believes that it is unnecessary to make such a statement in regulatory form. A state is free, in any event, to adopt such a provision and EPA would approve it.

Another commenter asked EPA to establish in the Part 51 regulations that a state with its own PSD program, in adopting new, more stringent requirements for BACT and air quality assessments in accordance with the new Part 51 regulations, may also adopt grandfather provisions that would apply the new requirements prospectively. In response, EPA had added a new section 51.24(a)(6) to the Part 51 regulations. The new section provides that PSD SIP revision may operate prospectively, thereby establishing that a state may adopt grandfather provisions of that sort. It adds, however, that the revision must take effect no later than the date of its approval. EPA has also added a new section 51.24(i)(9) to the Part 51 regulations. It provides that an approval revision to a state PSD program, which program EPA has already approved, may contain transition provisions that parallel the new Part 52 transition provisions. The new section also establishes that the proposed transition provisions must operate at least as stringently as their Part 52 counterpart would in the context of the state PSD program.

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[7] Even if the conflict between sections 165(a), 165(e)(2), and 168 had not conferred on EPA the discretion to exempt certain projects from the new air quality analysis requirements, EPA would have had authority under section 301(a)(1) to exempt those projects, because application of those requirements would have been unfair.

Finally, a third commenter urged EPA to require a state with its own PSD program to delete these aspects of the plan that go beyond the requirements of the new Part 51 regulations within nine months after the date of promulgation of those new regulations, unless the state within that period of time submits "to EPA written acknowledgment that it is not required by federal law to include such provisions in its state plan, but has nevertheless elected to do so under state law pursuant to section 116 of the Act." The commenter feared that, absent such a requirement, inertia and lack of resources might prevent some states from deleting the provisions in question. Such a requirement, however, would interfere unnecessarily in the affairs of a state. EPA, moreover, doubts that it would have the authority in any event to repeal the more stringent aspects of a state plan simply because the state failed to say by a certain time that it wanted to retain those aspects. EPA therefore has not promulgated the requirement sought by the commenter.

After examining the Part 51 regulations in response to those comments, EPA has decided to add two new provisions. The first, section 51.24(a)(6), merely states in regulatory form what section 406(d)(2)(B) of the Clean Air Act Amendments of 1977 already states: any PSD SIP revision, required by the new Part 51 regulations must be adopted and submitted within nine months of the date this notice appears in the Federal Register. The second provision, § 51.24(a)(6)(ii), establishes explicitly that any PSD SIP revision must contain provisions which describe when and as to what sources and modifications the revision is to take effect. The purpose of that requirement is merely to minimize confusion and uncertainty during the transition from any old to new PSD SIP requirements.

C. Offset Ruling

The amendments to the Offset Ruling which EPA is announcing in this notice expand its coverage, just as the amendments to the Part 52 PSD regulations expand its coverage. In EPA's view, the expansion of the coverage of the Offset Ruling should operate prospectively only. Hence, it has inserted into the Ruling a grandfather provision that parallels the relevant PSD grandfather provision. It provides that the Ruling does not apply to any source or modification that was not subject to the version of the Ruling in effect prior to the date this notice appears in the Federal Register, if all necessary SIP permits were obtained for the source or modification by that date and if construction commences within 18 months of that date.

D. Part 51 Nonattainment Regulations

Pursuant to section 406(d)(2)(B) of the Clean Air Act Amendments of 1977, states will have nine months after the date of this notice appears in the Federal Register in which to adopt and submit any new definitions and other regulatory provisions required by new 40 CFR 51.18(j). States need not adopt verbatim the definitions in section 51.18(j)(1), but they must demonstrate that any different definitions they retain or adopt have the effect of being at least as stringent as those set out in § 51.18(j)(1). If a state plan currently includes definitions or regulatory provisions which are more stringent than the nonattainment definitions and other provisions contained in these final rules, the state has the choice of retaining its current regulations or of revising them so as to conform to EPA's rules. If a state does not submit any necessary revisions to its plan within nine months after the date this notice appears in the Federal Register, the construction moratorium will go into effect 15 months after this date in all nonattainment areas in that state. The additional 6 months is consistent with the review period allotted for Part D submitted under section 110(a)(2)(I) and 129(c) of Pub. L. 95-95.

EPA received only one comment on transitional requirements for § 51.18(j). This commenter requested that EPA allow states which have already adopted NSR regulations pursuant to section 173 of the Act be permitted to adopt a rescission provision like that of § 52.21(w). EPA believes that to make such a statement in regulatory form is unnecessary. A state is free to adopt such a provision, and EPA will approve it, provided that the state's NSR program meets the requirements of section 173 and that permit rescission will not interfere with reasonable further progress or attainment of ambient air quality standards.

E. Construction Moratorium

The amendments to the construction moratorium expand its coverage in some ways, too. Hence, EPA has promulgated a grandfather provision patterned after the relevant PSD and Offset Ruling provisions. It appears as § 52.24(g).

F. Pending SIP Revisions

By the date this notice appears in the Federal Register, EPA will not have taken final action on many PSD and nonattainment SIP revisions that states have already submitted. EPA intends to review those pending revisions under the requirements that applied to them before the date of promulgation. To wait until a state had revised its revisions to bring them into line with the new PSD and nonattainment requirements would cause the state and its industry to suffer a heavy and undue burden, particularly in those cases where approval of a Part D plan is needed to lift the construction moratorium.

G. Effective Date of the Nonattainment Provisions

EPA has made all of the new nonattainment provisions announced here effective immediately upon their promulgation. EPA finds that it has "good cause" within the meaning of the relevant provisions of the Administrative Procedure Act to do so. First, the new provisions in the main provide relief from pre-existing regulatory burdens. Second, the decision in *Alabama Power* and the September 1979 proposal provided ample warning of the new changes. Finally, it is important for planning and management by EPA, the states and industry that these new provisions come into effect as soon as possible.

H. Miscellaneous

Under the amendments announced in this notice, each set of PSD and nonattainment regulations uses the phrase "this section" at some points and phrases such as "40 CFR 52.21" at other points. EPA intends "this section," when used in a particular set of regulations to refer only to the version of the regulations which has resulted from the amendments announced here. For example, the phrase "this section" in new § 52.21(i)(1)(i) refers only to the Part 52 PSD regulations as newly constituted. EPA intends phrases such as "40 CFR 52.21" to refer to any version of the particular regulations which has appeared or is to appear at the particular location in the Code of Federal Regulations. For example, "40 CFR 52.21" refers to each version of the Part 52 PSD regulations that has ever existed, including the version that has resulted from the amendments announced here.

V. Potential to Emit

The preconstruction review requirements of section 165 of the Act apply to any "major emitting facility." 42 U.S.C. 7475. Pursuant to section 169(1), that term includes any stationary source which emits or has the "potential to emit" 100 tons per year or more of any pollutant, for sources included in one of 28 specified source categories, or 250 tons per year or more of any pollutant for any other type of source. 42 U.S.C. 7479(1).

A. Control Equipment

Obviously, many more sources would be affected if the term "potential to emit" referred to the amount of pollution that a source would emit without controls than if it took the operation of control equipment into account. In the PSD regulations promulgated on June 19, 1978, EPA took the former approach and defined "potential to emit" as "the capability at maximum capacity to emit a pollutant in the absence of air pollution control equipment." 40 CFR 51.24(b)(3), 52.21(b)(3) (1979). This approach was rejected by the *Alabama Power* decision which held that Congress intended that, in determining a facility's potential to emit, EPA "must look to the facility's 'design capacity' a concept which not only includes a facility's maximum productive capacity (a criterion employed by EPA) but also takes into account the anticipated functioning of the air pollution control equipment designed into the facility." 13 ERC 1993, 2003.

In response to the court's decision, EPA proposed, on September 5, 1979, a revised definition under which the application of control equipment would be taken into account in computing potential emissions. That approach, which was very strongly supported by public comments, is now being promulgated. 40 CFR 51.24(b)(5) and 52.21(b)(5).

The proposal noted that EPA will assume that a facility's air pollution control equipment will function in the manner reasonably anticipated. In this promulgation the Administrator is implementing the proposed approach by requiring that operation of control equipment be an enforceable requirement. In other words, a company may receive credit for the application of control equipment only to the extent that the resulting reduction in emissions is federally enforceable (see below). This provision is necessary, as a practical matter, to ensure that sources will perform the proper operation and maintenance for the control equipment. Thus, a source installing control equipment that would reduce emissions more than that required by generally applicable emissions limitations cannot receive credit for the additional increment of pollution reduction, unless it is federally enforceable. The definition of "potential to emit" is being modified appropriately.

Under the definition being promulgated, the potential to emit of existing sources with respect to the treatment of enforceable in-place control equipment shall be defined in the same fashion as discussed above for new sources. This responds to commenters who complained of this discrepancy in the September 5 proposal. Accordingly, potential to emit for all sources means the ability at maximum design capacity to emit air pollution, taking into account any *in-place* control equipment. Design capacity, and thus potential to emit, may be further limited if control equipment better than that normally required by the applicable SIP is installed and a correspondingly more stringent level of emissions control is included as an enforceable permit conditon. Finally, it should be noted that the potential to emit of a stationary source in today's rule is of primary importance in defining when a source would be major; it is not generally used in determining increment consumption or the baseline for assessing emission increases and decreases at a source (*see* Modification).

B. Continuous Operation

Under the existing definition of "potential to emit," a source can avoid PSD review if it binds itself, in a federally enforceable permit, to sufficiently limited hours of operation. 40 CFR 51.24(v)(5), 52.21(b)(5) (1979). In the September 5, 1979 proposal, EPA proposed to delete the clause which allows such adjustments and to presume continuous (24 hours per day, 365 days per year) operation. Consistent with that change, EPA also proposed to delete, from the same regulation, the words "or amount"; those words at present allow permit limitations on amount of materials combusted, processed, or stored to be considered in computing potential to emit. In making this proposal, the Administrator also requested comment on the need to adjust the assumption of continuous operation, in the case of sources which are physically incapable of such operation.

Many commenters (169 of 173) have strongly criticized this proposal, the most frequent response being that few sources operate constantly, and most cannot do so. These commenters also advised the Agency of certain benefits which would accrue from allowance of permit conditions in computing potential to emit. For example, a benefit noted is that such an approach would better relate the PSD permit applicability of new sources to the offset potential of existing sources, and to how the increment would be consumed. This approach was also claimed to be consistent with EPA's stated goal of developing PSD requirements which will fit into state programs in such a way as to minimize disruption of those programs and promote PSD SIP development by the states. Additionally, insignificant reviews would be minimized and PSD applicability would be more reflective of emissions actually produced by the source.

There was some comment in support of the proposal. A state environmental agency noted that emissions limits calculated from less than continuous operation are less easily enforceable than those which are based on continuous opertion. An environmental group supported the proposal on the grounds that it is consistent with the interpretation of "full design capacity," that it would be appropriately technology-forcing, and that it is necessary to protect the short term increment. These concerns are addressed below.

The court based its definition of "potential to emit" on the source's full design capacity. *Id.* at 2003. The June opinion in *Alabama Power* did not directly address the acceptability of legal limitations on operation but did stress design capacity in the sense of physical and technological, as opposed to operational, limitations. However, in the final opinion, released on December 14, 1979, the court stated:

> The design capacity of a facility rarely contemplates uninterrupted operation 24 hours per day, 365 days per year. Projected downtime for repairs and maintenance *or other factors* may reduce the hours of operation that are appropriately considered in the calculation of a facility's "potential to emit." (*Id.* at 2005, n. 73.) (Emphasis added)

EPA interprets this language as not precluding permit conditions, that are federally enforceable under the applicable SIP, from circumscribing a source's potential to emit. In view of the above, the Agency believes it has discretion to adopt the most reasonable approach to this issue and has, therefore, reconsidered its proposal. Today's regulations recognize the ability of all federally enforceable limitations to constrain the potential to emit of a stationary source.

The Administrator believes that the policy concerning "enforceable permit conditions" is responsive to most of the concerns raised by commenters who were critical of EPA's proposal. New sources are now allowed to avoid NSR for PSD and nonattainment areas by limiting their type or amount of operation. Moreover, potential to emit is now defined in the same way for new and existing stationary sources. The use of certain permit conditions also addresses the concerns raised regarding physical incapability and peak load or standby units. This is, source owners or operators can now agree to source-specific permit conditions to limit their operation as appropriate. Such conditions can make infrequent operation and other physically limiting factors outside the design capacity of an emissions unit legally enforceable and can thereby limit the applicability of NSR.

The final policy concerning enforceable permit conditions has also taken in account the concerns of those favoring the proposal. One commenter noted that limited operation conditions would require greater enforcement attention. The Administrator agrees, but he believes that such conditions can be reasonably enforced. Another commenter also noted the need to minimize any air quality threats to short term increments by sources with intermittent operation but high short term rates of emission. No commenter presented a solution to this problem. EPA believes, however, that short term emissions limitations can be computed to address threats to short term increments, should any problems actually arise. It would be the responsibility of the reviewing authority to identify, in periodic evaluations, any sources causing such problems and apply appropriate limitations on their emissions. The Administrator will consider rulemaking to develop short term applicability thresholds, if necessary, after a reasonable amount of review experience has been developed.

Finally, as a result of today's policy, a potential problem exists concerning the future relaxation of a preconstruction permit that previously caused a proposed stationary source to enjoy minor rather than major status. For example, a source might evade NSR through agreement to unrealistically stringent operating limitations in its permit, and later obtain a relaxation of the condition. The Agency believes that the problem can be dealt with by 40 CFR 52.21(r)(4), entitled "Source Obligation." That paragraph provides that any owner or operator of a source, who would receive a relaxation of a permit condition that had enabled avoidance of NSR, would then become subject to review for all units subject to the original permit, as if they were new sources. In other words, if operational limitations are to be considered as an aspect of a source's design, it is reasonable that the permit accurately incorporate that design. If such operation is changed, the permit, and concomitant obligations, should be correspondingly changed.

C. Additional Guidance

Fugitive emissions under today's regulations are applicable in defining potential to emit. (*See* Fugitive Emissions.) However, like the proposal, such emissions do not count in assessing permit applicability unless a specified type of source category is involved. To accomplish this a specific exemption has been added to the final regulations by which fugitive emissions will be included in determining potential to emit only for specified source categories.

The definition of "potential to emit" is important not only to PSD preconstruction review, but also to NSR under the Offset Ruling (44 FR 3274), the statutory requirements for nonattainment areas, and the restrictions on construction in sections 110(a)(2)(I) and 173(4) of the Act. EPA is promulgating for each of those nonattainment programs the same definition of "potential to emit" that it is promulgating for the PSD program, as well as a provision like § 52.21(r)(4). EPA also intends this definition to be implemented for those programs in the same way as for PSD.

EPA has traditionally distinguished, for the purpose of NSR, between the direct emissions of a source and its "secondary emissions." (*See* Additional Issues.) In revising the Offset Ruling in January 1979 the Agency added a definition of "secondary emissions" and a provision describing for what purposes and under what circumstances those emissions are to be taken into account. *See* 44 FR 3281, 3283–84 (January 16, 1979). EPA is now adding that concept to the PSD regulations and to the nonattainment provisions relating to NSR and the restrictions on construction. For each of those sets of provisions "secondary emissions" are to be excluded in determining whether the regulations apply to a source (*i.e.*, whether a source or modification is "major"). Similarly, the control technology requirements of BACT and lowest achievable emission rate (LAER) do not apply to secondary emissions. How the Agency would treat those emissions for other purposes, including PSD air quality impact analysis, is described in Additional Issues.

VI. 50-Ton Exemption

Under the 1978 PSD regulations, stationary sources or modifications with allowable emissions of less than 50 tons per year, 1000 pounds per day, or 100 pounds per hour were in general exempted from the BACT and ambient air quality analysis PSD requirements. 40 CFR 51.24(j)(2), (k), and 52.21(j)(2), (k) (1979). In its preliminary *per curiam* decision the court thought that its ruling on "potential to emit" made a ruling on the 50-ton exemption "academic," since no 50-ton source would ever be major if "potential to emit" referred to controlled emissions. 13 ERC at 1228–29. Nevertheless, it remanded the exemption to the Agency for reconsideration and noted that the Agency had exceeded its authority in establishing the exemption. In response, EPA proposed to delete the provisions which embodied the exemption, and to delete parallel provisions in the Offset Ruling. EPA, however, proposed adding to the PSD regulations a 50-ton exemption for certain modifications. The proposed exemption tracked section 165(b) of the Act closely, but not exactly. Essentially it provided that a source qualifying for the exemption would face a limited air quality review for SO_2 and PM. Use of the exemption would be restricted to modifications, at a plant existing as of August 7, 1977, entailing emissions increases of 50 tons or less of any pollutant after application of BACT and which would impact no Class I-area or interfere with the attainment of PM or SO_2 standards. All net emission changes since August 7, 1977 would be aggregated in applying the exemption.

All of the seventeen commenters who focused on the proposed provision expressed general agreement with this approach, but some commenters stated that the exemption should be broader. For example, four commenters wanted an additional 50-ton exemption after each full review. Five commenters requested a special, more lenient, review for pollutants whose emissions rates fall between 50 tons per year and the *de minimis* level in those cases where the exemption would not apply. The Administrator finds no grounds for providing additional exemptions after each review. Similarly, there is no justification or authority under section 165(b) for a special limited review for emissions increases falling between *de minimis* amounts and the 50-ton level. A few commenters suggested that other eligibility values than 50 tons be used. EPA responds that section 165 of the Act mandates the 50-ton figure, but that much of these commenters' concerns are dealt with by the *de minimis* provisions being promulgated today. Two other commenters requested that the exemption be governed by net emissions increases. Today's regulations provide that review is applicable to net emissions increases, thus addressing the concerns of the two commenters cited above. With this exception, and the two noted below, the 50-ton exemption is being promulgated as proposed.

Some commenters pointed out that EPA's proposed 50-ton exemption clause was more limted in its application than the Clean Air Act language of section 165(b), in that the September 5 proposal contained additional consideration of Class I area impacts (*e.g.*, 44 FR 51949, 40 CFR 51.24(k)(2)(i)). EPA agrees with these commenters and has eliminated that portion of the 50-ton exemption language dealing with Class I areas. *See* 40 CFR 51.24(i)(7) and 52.21(i)(7).

The 50-ton exemption contained in the Act made those sources existing as of August 7, 1977, eligible for the exemption; the same applicability date was proposed in September 1979 for this revised exemption. The *Alabama Power* final opinion suggested that EPA had authority to conform the eligibility date for the section 165(b) exemption to the "effective date" of the preconstruction permit requirements of the 1978 regulations, i.e., March 1, 1978. In the January 30, 1980 Federal Register notice EPA sought comment on changing the eligibility date and on whether March 1, 1978 would be the appropriate choice.

Twenty-four commenters addressed the issue of the eligibility date. Nineteen of these favored a date of March 1 or 19, 1978. Four wanted the date to be that of the final promulgation of these regulations. One commenter disagreed with the date change because it considers the exemption itself to be unauthorized; however, the Act clearly provides for the exemption, as explained elsewhere in this section. One industrial group alleged that the date of promulgation would be the proper eligibility date for the specific case of fugitive emissions, in that fugitives were not regulated as of March 1, 1978. This is apparently a reference to the fact that rulemaking relative to potential to emit (*see* Potential To Emit) had not yet been performed. In fact, though, fugitive emissions were covered by the 1978 regulations and the calculation of potential to emit does not change that circumstance. The commenters preferring March 19 to March 1 referred to a statement in *Alabama Power* that March 19, 1978 is the "effective date" of the regulations. 13 ERC at 2006, n.79. The "effective date" of those regulations is, however, March 1, 1978. *See Citizens to Preserve Spencer County* v. *EPA*, 12 ERC 1961, 1978; and Preamble to 1978 Regulations, 43 FR 26380, 26390. Concerning the comments favoring the date of this promulgation as the eligibility date, the Administrator notes that section 165(b) of the Act limits eligibility for the 50-ton exemption to those sources in existence on the date of enactment of the 1977 Admendments to the Act. For the reasons noted in the *Alabama Power* decision, EPA has authority to extend eligibility to March 1, 1978. However, the Agency cannot extend this deadline to today's promulgation. For these reasons March 1, 1978 is now promulgated as the eligibility date for the 50-ton exemption.

VII. Fugitive Emissions

For PSD determinations prior to the *Alabama Power* decision, EPA considered *all* reasonably quantifiable emissions of a pollutant—including both point emissions (*e.g.*, from a stack or chimney) and fugitive emissions—on the ground that the emissions deteriorate air quality regardless of how they emanate. This practice applied to calculations of a source's emissions and potential emissions of a given pollutant both: (1) for the threshold determination under section 169(1) of whether the source was a "major emitting facility" subject to section 165, and (2) for the permitting requirements of section 165 itself.

The *Alabama Power* court upheld EPA's practice for the latter purpose, and confirmed that:

> The terms of section 165, which detail the preconstruction review and permit requirements for each new or modified "major emitting facility" apply with equal force to fugitive emissions and emissions from industrial point sources.
>
> * * * * *
>
> EPA is correct that a major emitting facility is subject to the requirements of section 165 for each pollutant it emits irrespective of the manner in which it is emitted. [13 ERC at 2016–2017.]

However, as to the first practice, the court held that section 169(1) is controlled by the rulemaking provision of section 302(j), and that fugitive emissions of a given pollutant may be included in the threshold calculation under section 169(1) only if the Administrator first determines, by rule, that they are to be included.

Accordingly, as part of the September 5, 1979 rulemaking proposal, the Administrator identified 27 categories of stationary sources for which he proposed to include fugitive emissions in threshold calculations of "major emitting facility" status for purposes of both section 165 and new source review regulations. Numerous commenters responded that the Administrator's proposal did not constitute "adequate" rulemaking, and that fugitive emissions could not be included in threshold calculations unless the rulemaking also established, on an industry-by-industry basis, methods for quantification of fugitive emissions and for analysis of their impacts on air quality, and included the identification of effective techniques for their control. EPA has considered these comments, but believes that Congress intended the rulemaking provision of section 302(j) to serve a much simpler and narrower purpose.

As the court itself noted, "[t]he legislative history of this rulemaking provision is sparse," and it is therefore particularly difficult to discern Congress' motivation for including it. 13 ERC at 2017. In general, section 302(j) sets out the criteria for determining whether a source is "major" and hence subject to the stringent requirements of certain key provisions of the Act. Congress clearly intended such determinations to always include point emissions, the type most commonly associated with major polluters. It also expressed its affirmative intent *not* to exclude "non-point" or "fugitive" emissions from those determinations:

> [T]he "major stationary source" definition is clarified to indicate the inclusion of major sources of fugitive emissions (last year's bill was unclear in this respect) * * *.[H.R. Rep. 95–294, 95th Cong. 1st Sess. 4 (1977).]

Rather than include fugitive emissions across-the-board, however, Congress left it to the Administrator to determine for which particular categories of sources fugitive emissions will be included in threshold calculations.

EPA therefore believes that the purpose of the rulemaking under section 302(j) is to afford members of affected categories of sources an opportunity to comment on the Administrator's determination to include fugitive emissions in the threshold calculation, and to allow them to present factual or policy arguments in support of claims that it would *not* be appropriate to do so. Although many such presentations will be technically oriented, EPA does not agree that section 302(j) requires the formal promulgation of measurement, modeling or control techniques or guidelines, because the fundamental decision which the Administrator is making under section 302(j) is *whether* fugitive emissions should be included in threshold calculations.

EPA finds support for this interpretation of section 302(j) in the fact that section 165 does *not* contain any rulemaking provision governing the *substantive* regulation of fugitive emissions. As explained earlier, the *Alabama Power* court confirmed that once a source is determined to be a major emitting facility under section 169(1), the substantive preconstruction review and permitting requirements of section 165 "apply with equal force to fugitive emissions and emissions from industrial point sources." In other words, even if fugitive emissions remain excluded from threshold calculations, section 165 requires that fugitive emissions be taken into account in determinations of whether NAAQS or allowable increments will be violated (section 165(a)(3)) and that fugitive emissions be subjected to BACT requirements (section 165(a)(4)). But these substantive provisions do *not* require EPA's prior promulgation of technical rules governing measurement, analysis or control such as those which the commenters suggest are necessary under section 302(j). Since the determination to include fugitive emissions in threshold applicability calculations is discretionary under sections 302(j) and 169(1), while the substantive regulation of fugitive emissions from all major emitting facilities is mandatory under section 165, EPA does not believe that the rulemaking provision of section 302(j) was intended to require the promulgation of such technical guidelines or regulations.

EPA therefore concludes that the rulemaking which it conducted was "adequate" under section 302(j) since affected sources were afforded the opportunity to comment upon the proposed inclusion of fugitive emissions in their threshold calculations. EPA's responses to more specific comments are set out below. Several commenters objected that the first 26 specific categories of sources identified in the proposal (as sources whose fugitive emissions would be taken into account in threshold calculations) were virtually identical to the 28 categories of sources identified in section 169(1) as sources with threshold tonnages of 100 tons per year (rather than 250 tons per year) for determinations of "major emitting facility" status.[8] The commenters complained that by merely copying the 28 sources without any other supporting rationale, EPA failed to conduct proper rulemaking.

Although it is true that the two lists are virtually identical, it is not true that EPA failed to conduct proper rulemaking. To the contrary, the Administrator recognized that in specifically identifying 28 categories of sources in section 169(1), "Congress' intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air." 13 ERC at 2003. In light of that intent, the Administrator initially determined that as a matter of policy, it would be appropriate to count *all* emissions—including fugitive emissions—in threshold calculations of applicability for those 28 categories. The proposal reflected that determination as well as the Administrator's observation that, because those sources have traditionally been considered the major polluters in the country, EPA's experience in quantifying fugitive emissions from them is, in general, greater than its experience in doing so for other sources.[9]

Source Category and Reference

Primary zinc smelters
  Technical Guidance for Control of Industrial Process Fugitive Particulate Emissions—March 1977 (EPA-450/3-77-010)
Portland cement plants
  (EPA-450/3-77-010)
Iron and steel mill plants
  Particulate Emission Factors Applicable to Iron and Steel Industry (EPA-450/4-79-028) (EPA-450/3-77-010)
Primary aluminum ore reduction plants
  (EPA-450/3-77-010)
Primary copper smelters
  (EPA-450/3-77-010)
Petroleum refineries
  Compilation of Air Pollutant Emission Factors (AP-42)
Lime plants
  (NSPS) (AP-42) (EPA-450/3-77-010)
Phosphate rock processing plants
  (EPA-450/3-77-010)
Coke oven batteries
  (EPA-450/4-79-028)
Carbon black plants
  (AP-42)
Primary lead smelters
  (AP-42) (EPA-450/3-77-010)
Sintering plants
  (See Iron and steel mill plants)
Fossil fuel-fired boilers
  (See Fossil fuel-fired steam electric plants)
Petroleum storage and transfer units
  (AP-42)
Fossil fuel-fired steam electric plants
  (EPA-450/3-77-010)

Several commenters pointed out, however, that the two lists were not identical insofar as certain restrictions or limitations for six categories of sources in the section 169(1) list were not reflected in the proposed section 302(j) list. Specifically, the section 169(1) list includes only the following (the italicized portions were omitted from the proposal): fossil-fuel fired steam electric plants *of more than two-hundred-and-fifty million British thermal units per hour heat input;* coal cleaning plants (*thermal dryers*); municipal incinerators *capable of charging more than two-hundred-and-fifty tons of refuse per day;* carbon black plants (*furnace process*); fossil-fuel boilers *of more than two-hundred-and-fifty million British thermal units per hour heat input;* and petroleum storage and transfer facilities *with a capacity exceeding three-hundred-thousand barrels.* These discrepancies are the result of an inadvertent administrative error, since EPA intended to identify in the proposed section 302(j) list the same categories of sources identified by Congress in the section 169(1) list. Accordingly, the final list promulgated today reflects the qualifying descriptions specified above for the six categories of sources. Several commenters objected to the last category on the list of sources for which the Administrator proposed to include fugitive emissions in threshold calculations—namely, "any other stationary source category which, at the time of the applicability determination, is being regulated under section 111 or 112 of the Act." Section 111 concerns the establishment of standards of performance for new stationary sources (new source performance standards or NSPS) and section 112 concerns the establishment of national emissions standards for hazardous air pollutants (NESHAP). The commenters argued that the focus of these provisions is on emissions controls rather than on ambient air quality, and that there is therefore no logical link to support the automatic inclusion of fugitive emissions from a source for PSD threshold calculation purposes simply because the source is being regulated under section 111 or *section 112. EPA disagrees with* some of the commenters' assumptions and characterizations of NSPS and NESHAP regulation, but concludes for other reasons that the last category should be revised to apply only to sources which are being regulated under section 111 or section 112 as of the effective date of the amended PSD and NSR regulations.

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[8] The apparent discrepancy in the number of categories (i.e., 26 versus 28) is explained by the fact that the September 5, 1979 proposal listed hydrofluoric, sulfuric and nitric acid plants together in a single subheading.

[9] For example, EPA has previously published fugitive emissions data for many of the identified categories of sources:

The commenters contend that since an NSPS under section 111 merely reflects, for a category of sources, an emissions limitation which is achievable through the best system of continuous emissions reduction which "the Administrator determines has been adequately demonstrated," the establishment of an NSPS for a source is unrelated to the ambient air quality considerations which are at the heart of PSD review. What the commenters overlook, however, is that under section 111(b)(1)(B), NSPS are only promulgated for categories of stationary sources which have been included in a list under section 111(b)(1)(A); and section 111(b)(1)(A) directs the Administrator to "include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." In other words, although the NSPS itself may be based on technological considerations, the decision to develop the NSPS is clearly based on ambient air quality concerns. Moreover, under section 112, ambient air quality is clearly a compelling concern because a hazardous air pollutant to which a NESHAP will apply is one "which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."

In short, categories of sources are regulated under section 111 or section 112 on the basis of determinations by the Administrator that their emissions seriously and adversely impact ambient air quality, and the Administrator therefore determined that it would be appropriate to include their fugitive emissions in their threshold calculations for purposes of PSD and NSR review and regulation. That basic policy determination is being finalized today.

At the same time, however, EPA believes that the comments about "automatic" inclusion of categories of sources which are not now regulated under section 111 or section 112, but which may be regulated thereunder at some point in the future, raise valid concerns. Although EPA believes that the same basic policy considerations would support the inclusion of fugitive emissions for such categories of sources, EPA recognizes that unless a source had affirmative notice during this rulemaking that it will be regulated in the future under section 111 or section 112, it will not really have been afforded a meaningful opportunity to comment on the proposed inclusion of its fugitive emissions in its threshold calculations. Accordingly, EPA has determined to limit the scope of the last category on the proposed list to sources which are being regulated under section 111 or section 112 as of the effective date of these amended PSD and NSR regulations. At the time of any future rulemaking under section 111 or section 112 proposing to regulate additional categories of sources, EPA will conduct parallel section 302(j) rulemaking concerning the proposed inclusion of fugitive emissions in threshold calculations. On the issue of the appropriateness of including fugitive emissions in threshold calculations for particular categories of sources, the basic objection expressed by most commenters was that fugitive emissions data were either unavailable or inadequate, and that it would therefore be inappropriate to include fugitive emissions in threshold calculations for a particular category.

In response, EPA notes that such concerns should and will be addressed in the context of particular applicability determinations, but that they have not changed the basic policy decision made by the Administrator under section 302(j). As explained earlier, fugitive emissions *must* be taken into account under section 165 in determining the impact on ambient air quality of a proposed new source and the BACT requirements which will apply to it, even if there are no existing fugitive emissions data, or if the available data are crude. Obviously, the nature and extent of the available data and technologies are important factors in determining how fugitive emissions should be taken into account and how they should be regulated under the review and permitting process of section 165; but those factors will not avoid or eliminate the consideration of fugitive emissions under that process. Similarly, although the issue of quantification may be relevant to particular applicability determinations, EPA does not believe that that issue alone is critical in determining whether, as a general policy matter, it is appropriate to include fugitive emissions in threshold calculations for a particular category of sources.

EPA emphasizes, however, that fugitive emissions from a source in one of the listed categories will only be included in threshold calculations "to the extent quantifiable." EPA's intent was and is to provide sources the flexibility to explore with the reviewing authority in the context of a particular applicability determination, issues of quantification which might be peculiar to an individual source. (Of course, fugitive emissions will not have to be quantified for threshold purposes if the source would qualify as a "major emitting facility" on the basis of point emissions alone, a situation which EPA believes will occur more often than not.) As indicated above, EPA has in the past published data and other information relating to the quantification of fugitive emissions for various categories of sources and, as some commenters noted, additional data and information are currently under development. EPA considers these publications concerning quantification of fugitive emissions as guidance to be used as the starting point for analysis, not as methodology or data which must be rigidly adhered to in all circumstances.

EPA encourages the development of more sophisticated or precise methods or models for quantification of fugitive emissions, and will accept any estimate of a source's fugitive emissions if the source can support the accuracy and reliability of the methodology which it has developed or employed. In situations where there are no published emissions factors or other fugitive emissions data for a particular category of sources, EPA will consider quantification estimates developed by a source which have any reasonable and rational basis, including estimates based on the transfer of technology or based on principles of material balance. Moreover, if a source satisfactorily demonstrates that all such methodologies are inappropriate in its circumstances and that there is absolutely no basis for reasonably estimating its fugitive emissions, EPA would be willing to discount fugitive emissions in the threshold calculation for that individual source.

In short, sources will have an opportunity to discuss the appropriateness and reasonableness of fugitive emissions estimates for purposes of both the threshold calculation, as well as the requirements of section 165. EPA is therefore finalizing today the proposed list of categories of sources whose fugitive emissions will be included in threshold calculations. EPA has considered comments with respect to the proposed definition of "fugitive emissions," and has determined that one change is appropriate. Instead of defining fugitive emissions as "those emission which *do not* pass through a stack, chimney, vent, or other functionally equivalent opening," EPA believes that the term should apply to "those emissions which *could not reasonably pass* through a stack, chimney, vent or other functionally equivalent opening." This change will ensure that sources will not discharge as fugitive emissions those emissions which would ordinarily be collected and discharged through stacks or other functionally equivalent openings, and will eliminate disincentives for the construction of ductwork and stacks for the collection of emissions. Emissions which could reasonably pass through a stack, chimney, vent, or other functionally equivalent opening will be treated the same as all other point emissions for threshold calculation purposes.

In addition, in light of EPA's action today deleting the fugitive dust exemption (*see* Fugitive Dust Exemption), EPA is finalizing the proposed deletion of the existing definition of "fugitive dust" at 40 CFR 51.24(b)(6) and 52.21(b)(6) (1979).

VIII. Fugitive Dust Exemption

The 1978 PSD regulations provided that "fugitive dust" from a major stationary source or major modification be excluded from air quality impact assessment, 40 CFR 51.24(k)(5), 52.21(k)(5)(1979). Because of its decision regarding inclusion of fugitive emissions in threshold calculations, and because it questioned EPA's authority to establish the exemption in the manner in which it did, the court in *Alabama Power* vacated EPA's generalized excemption for fugitive dust and remanded it to the Agency for further consideration. 13 ERC at 1231 and 13 ERC at 2017.

In response to the court's opinion, EPA proposed deletion of the fugitive dust exemption. It also proposed to delete a parallel provision in the Offset Ruling (44 FR 3274). The majority of the public commenters directly opposed this proposal. The primary reasons were that fugitive dust allegedly has little impact on health and that techniques of evaluating its air quality impacts are unreliable.

As indicated above, the *Alabama Power* court vacated EPA's partial exemption of fugitive dust from the requirements of section 165 because the exemption was premised on the erroneous assumption that "the statute of its own momentum subjects major sources of fugitive emissions to PSD preconstruction review and permit requirements" 13 ERC at 2017. However, the court also expressed serious doubt that EPA had the statutuory authority to establish such an exemption by regulation, because (1) section 165 does not distinguish between fugitive emissions and point emissions, but applies "with equal force" to both types of emissions, 13 ERC at 2016, and (2) in the absence of explicit statutory exemption authority, EPA's "general" exemption authority is narrow in reach. 13 ERC at 2005–2010.

The court did outline, though, a mechanism which it indicated is available under the statutory scheme for acccomplishing the objective of partially exempting fugitive dust emitted by major emitting facilities from the requirements of section 165. That approach would involve defining the pollutant "particulate matter" "to exclude particulates of a size or composition determined not to present substantial health or welfare concerns," 13 ERC at 2018, n. 134, and then regulating such "excluded particulates" under section 111. Pursuant to section 109, EPA is currently reviewing the criteria document for the particulate matter NAAQS, and particle size is a factor being considered in this review. If the standard is revised, the rulemaking requirements of section 307(d) will apply.

EPA today is adopting its proposed deletion of the existing "fugitive dust exemption" and is deferring further action on any such "exemption" pending completion of the standard review process.

IX. Source

A. Proposed Definitions of "Source"

In the 1978 PSD regulations, EPA defined "source" as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." The Offset Ruling contained the same definition of "source."

In its June 1979 opinion in *Alabama Power,* the Court of Appeals rejected the definition of "source" in the PSD regulations. It concluded that Congress intended section 111(a)(3) of the Act to govern the definition of "source" for PSD purposes. That section defines "source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." In defining "source," EPA used the terms "building," "structure," "facility," and "installation," but then added "equipment," "operation," and "combination thereof." The court held that EPA, in adding those terms, exceeded its authority. It stated, however, that the Agency has substantial discretion to define one or more of the four terms in section 111(a)(3) to include a wide range of pollutant-emitting activities.

In its June opinion, the court also focused on the clause "which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or persons under common control)." The court held that the approach, which that clause embodied, of grouping pollutant-emitting activities solely on the basis of proximity and control is generally acceptable, since the Agency had "evidenced an intention to refrain from unreasonable literal applications of the definition and instead to consider as a single source only common sense industrial groupings." 13 ERC at 1230.

In September 1979, EPA proposed to define "building, structure, facility and installation" for PSD purposes as "any grouping of pollutant-emitting activities which are located on one or more contiguous or adjacent properties and which are owned or operated by the same person (or by persons under common control)." As the preamble to the September proposal explains in detail, EPA concluded that the proposed definition would serve the purposes of PSD adquately by requiring review of those major projects that would cause air quality deterioration. At the same time, the definition would operate to avoid review of projects that would not increase deterioration significantly. In EPA's view, the dominant purpose of PSD review is to maintain air quality within the applicable increments.

In September, EPA proposed to define the four component terms differently for nonattainment purposes. Specifically, the Agency proposed to define "building, structure and facility" as it had proposed to define them for PSD purposes, and "installation" as "an identifiable piece of process equipment." One effect of that proposal would be the application of nonattainment requirements to a new piece of equipment that would emit significant amounts of a pollutant for which the area had been designated nonattainment, regardless of any accompanying emissions offsets at the plant. The preamble to the proposal explained: "Unlike the PSD provision, the nonattainment provisions are primarily intended not merely to prevent excessive increases in emissions, but to reduce emissions. This fundamental difference in purpose requires a different approach to defining the sources that will be subject to NSR." 44 FR 51932. EPA proposed to apply this definition to "incomplete" SIPs, i.e., those which did not demonstrate attainment based exclusively on currently approved requirements. Fully "complete" SIPs could, under EPA's proposal, use the PSD definition.

In December 1979, the court issued its final opinion on the 1978 PSD regulations, which opinion superseded the June 1979 opinion. In the December opinion, the court reaffirmed its earlier conclusions that EPA must adhere to section 111(a)(3) in defining "source" *for* PSD purposes and that EPA has discretion to define the component terms "reasonably to carry out" the purposes of PSD. 13 ERC at 2039. The court added that "a plant is to be viewed as a source" and that the Agency "should" provide for the aggregation of polluting-emitting activities "according to considerations such as proximity and ownership." *Id.* at 2039 and 2040. But it warned that "EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms." Finally, the court said that any new definitions "should also provide explicit notice as to whether (and on what statutory authority) EPA construes the term source, as divided into its constituent units, to include the unloading of vessels at marine terminals and 'long-line' operations such as pipelines, railroads, and transmission lines. We agreed with Industry Groups that EPA has not yet given adequate notice as to whether it considers those industrial activities to be subject to PSD." *Id.* at 2040.

In January 1980, EPA solicited comment on the September proposals in light of the December opinion of the court. 45 FR 6803. EPA specifically asked for comment on whether factors other than proximity and control, such as the functional relationship of one activity to another, should be used. The Agency also asked for specific examples of cases where a literal application of the proposed definition would be unreasonable.

B. PSD: Comments on Proposal and Responses

Most commenters agreed that for PSD purposes EPA should adopt definitions of "building," "structure," "facility," and "installation" that would aggregate pollutant-emitting activities, instead of definitions that would restrict one or more of those terms to an individual activity. One commenter, however, argued that EPA should adopt for PSD purposes the same definitions of those terms that it had proposed to adopt for nonattainment purposes. The commenter asserted that the decision of the court in *ASARCO* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978), required the Agency to impose BACT on a new unit at a plant, even if the unit would result in no net increase in emissions. The commenter also asserted that the "all-encompassing definition * * * destroys the intent of the PSD program by letting opportunities for *reducing* increment consumption disappear before control technology standards (*i.e.*, NSPS) can be in place." (Emphasis added.)

EPA has decided to adopt for PSD purposes the sort of "all-encompassing" definitions that the commenter opposed. First, in its December 1979 opinion in *Alabama Power*, the court explicitly held that *ASARCO* "does not prevent aggregation of individual units of a plant into a single source." 13 ERC at 2040. Second, the dominant purpose of PSD review is not to reduce increment consumption, but rather to maintain air quality deterioration below an applicable increment. A definitional structure that aggregates pollutant-emitting activities into one "source" would serve that purpose, since it would allow only those changes at the "source" that would not significantly worsen air quality to escape review.

Some of the commenters who agreed that each of the component terms of "source" should aggregate pollutant-emitting activities also supported the use of proximity and control as the sole criteria for aggregating them. Most of those commenters, however, objected to the use of proximity and control as the sole criteria, some on the ground that the proposed definitions would be too inclusive and others on the ground that the definitions would not be inclusive enough.

The commenters who thought the definitions would be too inclusive asserted that they would group sets of activities at one site and under common control that are functionally or operationally distinct. Typical of the examples they gave are the following activities at one site and under common control: (1) a surface coal mine and coal-burning electrical generators that the mine supplies with coal; (2) a rock quarry and the portland cement plant that the quarry supplies with raw material; (3) a primary aluminum ore reduction plant, an aluminum fabrication plant and an aluminum reclamation plant; (4) a refinery, a service station, a research laboratory, a fertilizer factory, and a pesticide factory; and (5) a uranium mill and an oil field. With the language of the June 1979 opinion in mind, the commenters contended generally that to group the nominally different activities in each of those examples would violate any common sense notion of "plant."

The commenters who thought the proposed definitions would be too inclusive suggested a wide range of alternative definitions. For example, one group proposed that activities at one site and under common control should be combined only if: (1) they share the first three digits under the Standard Industrial Classification Code of the U.S. Department of Commerce, (2) they are dependent upon or affect the process of each other, (3) they use a common raw product or produce a common product, and (4) the proponent of the project in question does not show that the activities have entirely separate air quality impacts.

The commenters who thought the proposed definitions would not be inclusive enough urged the Agency to abandon control as a factor and adopt function in its place. Some of them described a plan by a group of independent companies to construct jointly a single coal-burning power plant to replace oil-burning power plants at various manufacturing sites belonging to those companies near to the site of the coal-burning plant. The commenters contended that EPA should treat the old plants and the new plant as being within one "source," so that the new plant might escape PSD review. They argued that the new plant would not deteriorate air quality, since presumably the decrease in emissions from the shutdown of the old plants would offset the increase from the new plant, and that to allow it to escape review would facilitate the national switch from oil to coal.

After considering the comments of those who objected to the use of proximity and control only, EPA has decided to adopt for PSD purposes a definition of "building, structure, facility, and installation" that is different from the one it proposed in September. The final definition provides that those component terms each denote "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same 'Major Group' (*i.e.*, which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003-005-00176-0, respectively)."

In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

The comments on the proposed definition of "source" have persuaded EPA that the definition would fail to approximate a common sense notion of "plant," since in a significant number of cases it would group activities that ordinarily would be considered as separate. For instance, a uranium mill and an oil field would ordinarily be regarded as separate entities, yet the proposed definition would treat them as one.

In formulating a new definition of "source," EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities on the basis of their functional interrelationships. While EPA sought to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity.

EPA has chosen the classification code in the *Standard Industrial Classification Manual, 1972*, as amended in 1977 ("*SIC*"), because it is both widely-known and widely-used. EPA has also chosen to use just one set of categories in the manual, those that describe each "Major Group" in the classification system and that bear a two-digit classification number, although the commenter who suggested that EPA use such a code also suggested that the Agency use the categories at the three-digit level. On the one hand, the two-digit categories are narrow enough to separate sets of activities into common sense groupings. In fact, most of the nominally different sets of activities in the examples given above would fall into a different two-digit category; only the fertilizer factory and the pesticides factory would fall into the same category. On the other hand, the categories are broad enough to minimize the likelihood of artificially dividing a set of activities that does constitute a "plant" into more than one group and the likelihood of disputes over whether a set of activities falls entirely into one category or another.

Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product. Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support. For example, a boiler might be used to generate process steam for both a commonly controlled and located kraft pulp mill and plywood manufacturing plant. If the yearly boiler output is used primarily by the pulp mill, then the total emissions of the boiler should be attributed to the mill.

In adopting the new definition of "source," EPA rejected the requests of those commenters who thought that the proposed definition would not be inclusive enough. As noted above, they urged that EPA formulate a definition that looked only to proximity and *function*. But such a definition by looking to function would unnecessarily increase uncertainty and drain the Agency's resources. In addition, such a definition would present groupings, such as the example the commenters gave, that would severely strain the boundaries of even the most elastic of the four terms, "building," "structure," "facility," and "installation."

Many commenters urged EPA to clarify the extent to which the final definition of those terms encompasses the activities along a "long-line" operation, such as a pipeline or electrical power line. For example, some urged EPA to add to the definition the provision that the properties for such operations are neither contiguous nor adjacent. To add such a provision is unnecessary. EPA has stated in the past and now confirms that it does not intend "source" to encompass activities that would be many miles apart along a long-line operation. For instance, EPA would not treat all of the pumping stations along a multistate pipeline as one "source."

EPA is unable to say precisely at this point how far apart activities must be in order to be treated separately. The Agency can answer that question only through case-by-case determinations. One commenter asked, however, whether EPA would treat a surface coal mine and an electrical generator separated by 20 miles and linked by a railroad as one "source," if the mine, the generator, and the railroad were all under common control. EPA confirms that it would not. First, the mine and the generator would be too far apart. Second, each would fall into a different two-digit *SIC* category.

Three commenters focused on whether and to what extent the emissions from each ship that would dock at a proposed marine terminal should be taken into account in determining whether the terminal would be "major" for PSD purposes. One commenter argued in effect that the emissions of each such ship that are quantifiable and occur while the ship is coming to, staying at or going from the terminal should be taken into account. In the view of that commenter, all of those activities would be "integral" to the operation of the terminal. Another commenter asserted that none of the emissions of any such ship should be taken into account, because ships are mobile sources. The remaining commenter contended that only the emissions that: (1) come from a ship which is under the proprietary control of the owner or operator of the terminal and (2) occur while the ship is at the dock should be included in an applicability determination. That commenter viewed the ability of the terminal owner or operator to regulate the behavior of a ship as the critical consideration.

The permit requirements of the final Part 52 PSD regulations apply to a collection of pollutant-emitting activities according to the "potential to emit" of just those activities in that collection which constitute a "stationary source." Whether and to what extent the emissions of ships that would dock at a terminal are to be taken into account in determining PSD applicability depends, therefore, on whether and to what extent the term "stationary source" in the final regulations encompasses not only the activities of the terminal itself, but also the activities of the ships while they are coming to, staying at, or going from the terminal.

The final definition of "building, structure, facility, and installation" resolves that question. EPA intends the term "stationary source" under that definition to encompass the activities of a marine terminal and only those dockside activities that would serve the purposes of the terminal directly and would be under the control of its owner or operator. The term "dockside activities" means those activities in which the ships would engage while docked at the terminal. While "stationary source" encompasses combinations of activities, it is limited to combinations that would be "stationary," that is, fixed to the particular site. The activities of a terminal itself would be stationary, but all ship activities would not be. Only those that would directly serve the purposes of the terminal, such as loading and unloading, would be stationary since they alone would be in a sense fixed to the particular site. Hence, "stationary source" encompasses the activities of a marine terminal and only those dockside activities that would directly serve its purposes.

In addition, while "stationary source" encompasses combinations of stationary activities, it is further limited to those that would locate on "contiguous or adjacent properties." In EPA's view, only dockside activities would be located on "property" that is contiguous or adjacent to the terminal. Next, "stationary source" is also limited to those combinations of activities that would be "under the control" of one person or one group of persons who are themselves under common control. Hence, "stationary source" encompasses only the activities at a terminal and those dockside activities over which the owner or operator of the terminal would have control. Finally, the activities at a terminal and any such dockside activities fall under a single two-digit *SIC* category, namely "Water Transportation" (number 44).

Whether a particular dockside activitiy would directly serve the purposes of a terminal and would be under the control of its owner or operator depends upon the circumstances of a specific situation. Presumably, however, the activity of loading or unloading a ship would in every case directly serve the purposes of the terminal and would be under the control of its owner or operator to a substantial extent. In particular, the Agency would expect that no loading or unloading could occur without the consent of the owner or operator and consequently that the owner or operator would set, or at least have a significant say in the setting of, the schedule for loading or unloading.

In adopting this interpretation of "stationary source," EPA in large measure has rejected the arguments of the commenters on the ship emissions issue. First, to treat *all* of the activities of a ship while it is coming to, staying at, and going from a terminal would violate any common sense notion of "building," "structure," "facility," or "installation." To group just those activities occurring at the terminal that are essential to its functioning entirely comports with common sense. Second, an activity such as loading and unloading is certainly stationary, even if the ships that engage in it have mobility. Ships, moreover, are not "mobile sources" within the meaning of section 110(a)(5) of the Act, the provision restricting indirect source review. Finally, the fact that a terminal owner or operator does not own a particular ship does not mean that the owner or operator has no control over behavior of the ship at the terminal.

In deference to the position taken in *Alabama Power,* EPA has decided to treat the definition of "source" in the 1978 PSD regulations as *not* encompassing any ship or ship activity. As a result, ship emissions are not to be taken into account at all in determining whether a marine terminal is subject to review under the 1978 PSD regulations. A terminal which would not be subject to review under the 1978 regulations if ship emissions are not included in the determination of potential to emit can also be excluded from review under the new regulations provided certain conditions are met. These conditions are that the owner or operator of such a source has obtained each of the permits required under the SIP for the terminal before the date this notice appears in the **Federal Register** and commences construction on it within 18 months after that date.

The final definition of the component terms of "stationary source" differs from the proposed definition in one significant respect. The proposed definition used the phrase *"any grouping of* pollutant-emitting activities." The final definition uses the phrase *"all of the* pollutant-emitting activities." Taken literally, the proposed definition would have referred not only to all of the activities at a plant, but also to any subgroup of those activities. EPA, however, intended it to refer only to all of the activities. The final definition merely makes that explicit.

C. Nonattainment: Comments on Proposal and Response

Many commenters objected to EPA's proposed definition of "source" for nonattainment areas. Several commenters argued that there was no statutory basis for the distinction drawn in the proposal between "complete" and "incomplete" SIPs. Most of the commenters further claimed that the "dual definition" (*i.e.,* treating a source as both a plant and an individual piece of process equipment at the plant) both was illegal under the statute and *Alabama Power* and was wrong as a matter of policy.

The legal arguments presented by the commenters fell into two broad categories. First, they argued that the dual definition really defined "source" as a combination of surces, which had been forbidden by both *Alabama Power* and *ASARCO.* EPA therefore could, in these commenters' view, define "source" as either the entire plant or an individual piece of process equipment, but not both. These commenters opted for the former approach.

The second legal argument challenged EPA's contention that use of the plant-wide definition would be improper in nonattainment areas, because the purpose of the nonattainment new source review program is to reduce emissions, not to hold emissions constant. The commenters claimed that the Act gives primary responsibility for assuring reasonable further progress to the states, and the states therefore can choose whatever mix of strategies they want to achieve reasonable further progress. This suggested to the commenters that EPA had no authority to ban a plant-wide definition for new source review if the state could otherwise demonstrate reasonable further progress.

Several commenters also pointed to a variety of policy concerns which they felt militated against EPA's proposed dual definition. First, they argued that the definition would discourage technological innovation that could actually reduce emissions, because sources would be reluctant to modernize for fear that such requirements as LAER would be applied to them. In particular, they felt sources would be unwilling to retire old inefficient facilities and replace them with efficient cleaner ones. Second, some commenters claimed that there was no point to reviewing a facility where offsetting emissions could be obtained, since on the whole ambient air quality would not get any worse. Finally, many commenters complained that the definitional structure as a whole was far too complex, and they urged that EPA simplify the system both by eliminating the distinction between "complete" and "incomplete" SIPs and by adopting one definition for both PSD and nonattainment areas. Most commenters preferred the PSD definition, although some urged that the dual definition be used.

In revising the Offset Ruling in January 1979, EPA adopted definitions of "source" and "modification" which had the effect of requiring any increase greater than 100 tons in the potential to emit of a plant to undergo nonattainment new source review, even if offsetting reductions at the plant were to accompany the change. The effect of the proposed definitions of "source" and "modification" which are being promulgated today would be basically the same as those in the Offset Ruling. Adoption of the proposed definitions would constitute, therefore, a continuation of an established approach to nonattainment new source review.

The comments on the dual definition have failed to persuade EPA that it should abandon the established approach at this time. As a result, the agency has decided to adopt the dual definition in each set of nonattainment regulations. For the reasons given below, EPA does not agree that the dual definition is either illegal or unsound from a policy standpoint. In addition, the agency has decided that the dual definition should be used regardless of whether the SIP is complete or incomplete. EPA agrees with the commenters that there is little support in the statute for defining "source" according to the complete or incomplete status of the SIP, and that the proposed definition was complicated.

The dual definition, by defining individual units as a "source," will bring more units in for review in areas with unhealthy air and thereby result in reducing emissions from the status quo. The legislative history of the Act indicates that new source review was intended to be an important tool in the drive towards attainment of ambient air quality standards. As the House Report stated:

> [M]aximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth. This is particularly true in light of the requirement for reasonable further progress and the indications that emissions from many existing sources in nonattainment areas will be increasing (due to fuel switching, natural gas curtailments) or remaining static (due to delayed compliance orders, et catera). Finally, the technology forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas. For all these reasons, the committee adopted the requirement for proposed new or modified major stationary sources in nonattainment areas to meet the lowest achievable emission rate requirement.

H. Rep. No. 95–294, 95th Congress, 1st Sess. 215 (1977). In addition, after hearing testimony that no steel sources owned by five major steel companies were in compliance, the House inserted into section 173 a requirement that the owner of a proposed source or modification demonstrate that all other sources owned, operated, or controlled by him in the state are in compliance with the applicable SIP. *Id.* at 210–213. In this way, Congress meant to use new source review as a means of cleaning up *existing* sources as well.

To realize this goal fully, Congress intended that new source review be applied to the greatest extent possible. For example, Senator Muskie, in presenting the Clean Air Act Amendments of 1977 to the Senate, spoke of reviewing "any physical change which increases [emissions] * * *," and he went on to note:

> Thus, [under the offset ruling and Part D NSR requirements] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a new reduction from previous emission levels. 123 Cong. Rec. at S 13702 (daily edition, August 4, 1977).

Since the dual definition would bring in more sources or modifications for review than would the plant-wide definition used for PSD purposes (including many replacement facilities which would not be reviewed under a plant-wide definition), use of the dual definition clearly is more consistent with Congressional intent.

The dual definition also is consistent with *Alabama Power* and *ASARCO*. *Alabama Power* held that EPA had broad discretion to define the constituent terms of "source" so as best to effectuate the purposes of the statute. Different definitions of "source" can therefore be used for different sections of the statute. *See* 13 ERC at 2039. As EPA discussed in detail in its proposal, the purpose of the nonattainment provisions is to "positively reduce emissions," not merely to hold emissions constant. In addition, unrestricted use of meeting emissions at an entire plant in nonattainment areas would make attainment more difficult, since many of the limited number of cost-effective opportunities to reduce emissions will in fact be used to avoid review. *See* 44 FR 51932. The dual definition therefore comports with the purposes of Part D of the Act.

Moreover, *Alabama Power* and *ASARCO* taken together suggest that there is a distinction between Clean Air Act programs designed to *enhance* air quality and those designed only to *maintain* air quality. In *ASARCO*, the Court of Appeals for the District of Columbia Circuit struck down the definition of "source" for new source performance standards (NSPS), which had employed a "bubble" concept. An important element in the court's decision was its belief that the "bubble," by allowing sources to escape NSPS, was inconsistent with the purpose of NSPS, which was to improve air quality. *See* 578 F.2d at 327–28. But in *Alabama Power*, the same court held that for PSD purposes, EPA must use a "bubble" approach, precisely because PSD is designed to maintain air quality and therefore deals with "a significantly different regulation and statutory purpose." 13 ERC at 2044.

Under this analysis, use of a plant-wide definition to avoid new source review would appear to be inappropriate in nonattainment areas, since the purpose of nonattainment SIPs is to improve existing air quality so as to attain the ambient air quality standards. EPA therefore believes that it would be more consistent with the purposes of the Act not to permit states to choose a plant-wide definition of source.

Promulgation of the dual definition follows the mandate of *Alabama Power*, which held that, while EPA could not define "source" as a combination of sources, EPA had broad discretion to define "building," "structure," "facility," and "installation" so as to best accomplish the purposes of the Act. 13 ERC at 2039. This holding contemplates that one term (such as "building") may be more inclusive than another term (such as "installation"), and so a "building" may include many "installations." In this way, a "source" can, under *Alabama Power*, be composed of smaller "sources," yet not be a combination of sources. The dual definition fits into *Alabama Power*, since under EPA's definitional scheme, a "source" is either an individual piece of process equipment or the entire plant; it is not a combination of sources. That is, when deciding whether a source must undergo new source review, the reviewing authority must determinine whether there was a significant increase in emissions at either a "major" individual piece of equipment or at the plant as a whole. Wherever such an increase occurs is a "source." Thus the plant itself is a source, not a combination of sources, although it may contain smaller sources.

EPA recognizes that use of different definitions for PSD and nonattainment areas adds to the complexity of the permitting process. But this additional complexity is outweighed by the need for a more inclusive definition of source in nonattainment areas in order to assure attainment of standards.

Although it is claimed that some sources may not be willing to modernize their facilities due to the perceived added expense of LAER and the need to demonstrate statewide compliance, EPA believes that its approach is justified by the fact that the dual definition will bring in more sources and modifications for review and will require better pollution control technology in nonattainment areas.[10]

EPA disagrees that use of a plant-wide definition would allow a plant with a new installation to achieve the same emissions reductions as LAER, but in a less expensive manner by finding offsets elsewhere in the plant. This argument assumes that LAER is markedly more costly than the requirements that would otherwise apply. EPA believes that its own past actions, and those of the states, indicate that LAER need not and is not generally being interpreted in this manner.

EPA believes, and most commenters agreed, that new facilities should install state-of-the-art control technology. Such a requirement is imposed by the Clean Air Act for major new sources in PSD areas (BACT), for major new sources in nonattainment areas (LAER), and whenever EPA has set new source performance standards (NSPS). EPA therefore intends to interpret the LAER requirement in a reasonable manner, as it believes it has in the past, and to take a close look whenever LAER would be substantially stricter than these other requirements.

EPA intends that its interpretation of "building, structure, and facility" be identical to that for "building, structure, facility, or installation" used for PSD purposes.[11]

X. Modification

This section discusses the final PSD and nonattainment definitions of "major modifications" and "net emissions increase" which EPA is promulgating in this notice. The section first describes those final provisions. It then focuses on each of their major aspects, giving in particular the relevant proposal, the comments on it and EPA's responses. An example of how the definitions work appears at the end of the section. The section also discusses a provision which appears in the PSD and nonattainment definitions of "major stationary source," but which stems from the final formulation of "major modification." That provision establishes that a physical change at a "minor" stationary source which change by itself would constitute a "major stationary source" shall be treated as a "major stationary source."

A. Final Definitions of "Major Modification" and "Net Emissions Increase"

With the final amendments announced here, the Part 51 and Part 52 PSD regulations now define "major modification" as any *"physical change"* or *"change in method of operation"* at a major stationary source which would result in a *"significant net emissions increase"* in any pollutant subject to regulation under the Act. *See* §§ 51.24(b)(2) and 52.21(b)(2).

While the new PSD regulations do not define "physical change" or "change in method of operation," they provide that those phrases do not encompass certain specific types of events. Those types are: (1) routine maintenance, repair and replacement; (2) a fuel switch due to an order under the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or due to a natural gas curtailment plan under the Federal Power Act; (3) a fuel switch due to an order or rule under section 125 of the Clean Air Act; (4) a switch at a steam generating unit to a fuel derived in whole or in part from municipal solid waste; (5) a switch to a fuel or raw material which (a) the source was capable of accommodating before January 6, 1975, so long as the switch would require no change in any preconstruction permit condition established after that date under the SIP (including any PSD permit condition) or (b) the source is approved to make under a PSD permit; (6) any increase in the hours or rate of operation of a source, so long as the increase would require no change in any preconstruction permit condition established after January 6, 1975 under the SIP; and (7) a change in the ownership of a stationary source.

The new PSD regulations define "significant" in terms of *de minimis* thresholds for each pollutant subject to regulation under the Act. Those thresholds appear in §§ 51.24(b)(21) and 52.21(b)(21). For example, the threshold for sulfur dioxide is 40 tons per year. A "net emissions increase" in sulfur dioxide below that level is not "significant." For a fuller discussion of the thresholds, see the section entitled *De Minimis* Exemptions.

Finally, the new PSD regulations contain definitions of "net emissions increase," which appear as §§ 51.24(b)(3) and 52.21(b)(3). Under those definitions, "net emissions increase" denotes the positive sum of any increase in "actual emissions" from a particular physical or operational change at a source and any other increases and decreases in "actual emissions" that are contemporaneous with the particular change and otherwise creditable.

The first step in determining whether a "net emissions increase" would occur is to determine whether the physical or operational change in question would itself result in an increase in "actual emissions." If it would not, then it could not result in a "net emissions increase." If it would, the second step is to identify and quantify any other prior increases and decreases in "actual emissions" that would be contemporaneous with the particular change and otherwise creditable. The third step, finally, is to total the increase from the particular change with the other contemporaneous increases and decreases. If the total would exceed zero, then a "net emissions increase" would result from the change.

The definitions of "net emissions increase" specify which increases and decreases in "actual emissions" are contemporaneous. Under the definition in the Part 52 PSD regulations, increases or decreases are contemporaneous with a proposed change only if they occur between two dates: first, the date five years before construction "commences" on the proposed physical or operational change in question and, second, the date the increase from that change "occurs." An increase from a physical change "occurs" when the affected emissions unit becomes operational and begins to emit a particular pollutant. Any unit that requires shakedown becomes operational only after a reasonable shakedown period (not to exceed 180 days). Under the definition in the Part 51 regulations, a state in revising its SIP may set a period other than the five-year period of the Part 52 regulations to define what is contemporaneous and what is not, so long as the period is not unreasonably long.

The definitions of "net emissions increase" in the PSD regulations also specify which contemporaneous increases and decreases in "actual emissions" are creditable. A contemporaneous increase or decrease is creditable only if the relevant reviewing authority has not relied on it in issuing a PSD permit for the source, and that permit is still in effect when the increase in "actual emissions" from the particular change occurs. A reviewing authority "relies" on an increase or decrease when, after taking the increase or decrease into account, it concludes that the proposed project would not cause or contribute to a violation of an increment or ambient standard. A contemporaneous increase or decrease in "actual emissions" of sulfur dioxide or particulate matter that occurs before the applicable baseline date is creditable only if, in addition, it is required to be considered in calculating how much of a particular increment remains available.

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[10] Contrary to one commenter's argument, EPA believes that the dual definition will not cause sources to locate in clean areas. Any such source would be subject to PSD review in any event.

[11] One commenter requested EPA define "source as one emitting the criteria pollutants, and not "any pollutant regulated under the Act." EPA has decided to retain its definition, since it comports with section 302(j) of the Act. However, pursuant to section 172(b)(6), EPA will require new source review permits only for those pollutants for which an area has been designated nonattainment and for which the source is major.

Finally, the definitions of "net emissions increase" in the new PSD regulations specify the extent to which any contemporaneous and otherwise creditable increase or decrease is creditable. Any such increase is creditable to the extent that the new level of "actual emissions" exceeds the old level of "actual emissions." Any such decrease is creditable only to the extent that (1) the old level of "actual emissions" (or the old level of "allowable emissions," if it is lower) exceeds the new level of "actual emissions," (2) the decrease is federally enforceable at the time construction begins on the proposed physical or operational change which it is intended to offset, and (3) the decrease has roughly the same health and welfare significance as the increase from the proposed change.

Under the final PSD regulations, the phrase "actual emissions" means the rate at which an emissions unit actually emits a particular pollutant. *See* §§ 51.24(b)(21) and 52.21(b)(21). In general, that rate as of a particular date equals the average rate in tons per year at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and is representative of normal source operation. The reviewing authority may presume that any "source-specific allowable emissions" for the unit is equivalent to the actual emissions of the unit. For any unit which has yet to begin normal operations on the date in question, its actual emissions equal its "potential to emit" on that date. For a fuller discussion of the concept of "actual emissions" and in particular of what constitutes "source-specific allowable emissions," see the section on Increment Consumption.

The final PSD regulations also describe in detail the concept of "allowable emissions." *See* §§ 51.24(b)(16) and 52.21(b)(16). That phrase means in essence the maximum rate at which an emissions unit under the most stringent of certain legal constraints may emit a particular pollutant. The legal constraints are (1) any applicable standards in 40 CFR Parts 60 and 61, (2) any applicable SIP limitations, including any with a future compliance date, and (3) any applicable condition in a permit issued under the SIP that is federally enforceable, also including any condition with a future compliance date.

The final amendments to the Offset Ruling, 40 CFR 51.18 and 40 CFR 52.24 which are announced here also include new definitions of "major modification," "significant," "net emissions increase," "actual emissions," and "allowable emissions." In general those definitions follow the pattern of the PSD definitions. Only the definitions of "net emissions increase" in those nonattainment provisions vary significantly. They add that a decrease in "actual emissions" which is contemporaneous with the increase in question may be credited only if and only to the extent that the relevant permitting authority has not already accepted it as a satisfactory "offset" in issuing a preconstruction permit under the SIP.

B. No Net Increase

The *Alabama Power* decision rejected EPA's regulatory approach of requiring PSD review of potential emissions increases at existing stationary sources only when such increases would equal or exceed the 100/250 ton threshold used in the review of new sources. It held instead that a change in a major stationary source is subject to review only if it would result in any significant net increase. In response, EPA proposed on September 5, 1979, an approach that would subject to new source review (NSR) under the relevant PSD or nonattainment provisions only each significant net increase that would occur in the potential to emit of a major stationary source. Under the proposal, a significant net increase was to be an overall increase in the potential to emit of the source equal to or greater than a pollutant-specific emissions cutoff (*see De Minimis* Exemptions), taking into account contemporaneous emissions increases and decreases at the same source. An exception to this general rule of netting contemporaneous increases and decreases was to be the case of construction restrictions under sections 110(a)(2)(I) and 173(4). There, accumulated increases would count toward triggering the growth prohibitions, without regard to any contemporaneous reductions occurring at the same source.

Public comment supported this proposal (except with respect to the construction restrictions) as the clear and proper interpretation of the *Alabama Power* decision. Sixty-two of sixty-three commenters endorsed the general netting approach to modification taken in the proposal, although several took issue with certain of the specific rules relating to the concept (see discussion below). Several commenters felt that requiring any significant net increase to undergo review was too strict on existing sources as compared with new sources, since new sources can emit up to 100/250 tons per year and still not be subject to review. The terms of the Act and the court decision preclude allowing such a general exemption for existing sources. Pursuant to *Alabama Power*, the Administrator is today promulgating the netting concept for determining the review applicability of changes at existing major stationary sources (consistent with each program's definition of source). This promulgation affects regulations for PSD (40 CFR 52.21 and 40 CFR 51.24), nonattainment NSR (Emissions Offset Interpretative Ruling and 40 CFR 51.18(j), Review of New Stationary Sources and Modifications), and the construction restrictions under sections 110(a)(2)(I) and 173(4), (40 CFR 52.24, Statutory Restriction on new Stationary Sources). Allowance of netting for determining the applicability of 40 CFR 52.24 is a change from the proposal and is discussed below.

C. Pollutant Applicability

EPA proposed to require preconstruction review only if the increase in potential to emit would be for a pollutant which the source emits in major amounts. Once an increase in the major pollutant triggered PSD review then review would be required for all regulated pullutants emitted in greater than *de minimis* amounts as a result of the modification. Review would also be required if the emissions change itself were equivalent to a major stationary source.

Only limited comment was received on EPA's proposal to require review where major changes in emissions of minor pollutants or greater than *de minimis* changes in emissions of a major pollutant would occur. While a few groups endorsed the September 5 proposal, one group argued that *Alabama Power* did not restrict PSD applicability to just modifications involving the pollutant(s) which the source emits in major amounts. That group pointed out that section 111(a)(4) of the Act defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of *any air* pollutant emitted by such source or which results in the emissions of *any air pollutant not previously emitted.*" (Emphasis added.)

The Administrator agrees that requiring review for a net emissions increase in any pollutant subject to regulation under the Act is consistent with the *Alabama Power* decision. Consequently, EPA is promulgating a final rule that requires PSD preconstruction review for net emissions increases in greater than *de minimis* amounts at a major stationary source for any pollutant subject to regulation under the Act emitted by the source, regardless of whether the source is major for that pollutant.

The Administrator is not changing the September 5 proposal with respect to pollutant applicability in nonattainment areas. *See* Geographic and Pollutant Applicability. The source must be major for the nonattainment pollutant(s) and must make a greater than *de minimis* emissions change in such a pollutant in order to trigger nonattainment review for that pollutant(s). A PSD review, however, would be triggered if a greater than *de minimis* change occurs at that major source for any regulated pollutant emitted by the source other than the nonattainment pollutant(s).

D. Netting of Actual Emissions

EPA proposed on September 5 that an activity be deemed a major modification when the "potential to emit" of the major stationary source experiences a net increase greater than a *de minimis* amount, taking into account all contemporaneous changes. EPA also proposed that a reduction would be creditable only if the physical capability of the source to emit a pollutant were actually reduced. In addition, where "allowable emissions" for a source, as defined in the 1978 PSD regulations and the Offset Ruling would be less than its "potential to emit," no credit would be given for reducing potential emissions to "allowable emissions." "Allowable emissions," as defined in those regulations, meant the emissions rate calculated using the maximum rated capacity of the source and is represented by the most stringent than any of the following: (1) any applicable standards in 40 CFR Parts 60 and 61; (2) any applicable SIP emissions limitations; and (3) any emissions rate specified as a permit condition under the SIP. The applicable SIP limitation in the case of designated nonattainment areas included the emissions rate that was assumed for the source in the attainment demonstration and in the schedule for making reasonable further progress.

Forty of forty-two commenters favored an allowable emissions baseline, for determining whether a net emissions increase would occur, instead of one using "potential to emit." The other two commenters endorsed EPA's proposal. Many also complained of the different criteria for determining "potential to emit" from new and existing sources. (Under the proposal, "allowable emissions" and physical incapability could have constrained the "potential to emit" of existing but not new stationary sources.)

There are problems with using a baseline for netting that is based on the existing source's "potential to emit." A computation of an existing source's potential emissions could give a figure considerably higher than what it is actually emitting. This would be especially true if the source operated only a small part of the time or used considerably cleaner fuels than it is allowed to burn. Such an approach would therefore create a "paper offset" that could permit actual air quality to deteriorate seriously, while the change which increased actual emissions avoided NSR. Similar problems would arise if offsets were based on allowable emissions, as recommended by most commenters.

In the June 1979 opinion in *Alabama Power,* the court held that the definition of "modification" in section 111(a)(4) governs the definition of that term for PSD purposes. Section 111(a) provides that a "modification" is "any physical change in, or change in the method of operation of, a stationary source which increases *the amount* of any air pollutant *emitted* by such source or which results in *the emissions* of any air pollutant not previously *emitted.*" (Emphasis added.) Although the *underlined* words in the definition appear to refer to what the source is actually emitting at a particular time, the court in the June opinion described the concept of "modification" in terms of changes in the "potential to emit" of a source. As a result, EPA proposed definitions which also referred to changes in "potential to emit."

In its December 1979 opinion, however, the court used an entirely different set of terms to describe "modification." Instead of using "potential to emit," it used language which, like the section 111(a)(4) definition, suggest changes in actual emissions. For example, at one point the court states: "If these plants *increase* pollution, they will generally need a permit. Exceptions to this rule will occur when the *increases* are *de minimis,* and when the *increases* are offset by contemporaneous decreases of pollutants, as we discuss below * * *" (Emphasis added.)

Following the lead of the court, EPA has also shifted the focus of its regulatory definitions from "potential to emit" to "actual emissions." For both PSD and nonattainment purposes, a "major modification" is now any significant "net emissions increase" at a major stationary source that results from certain changes. "Net emissions increase" is, in turn, roughly any net increase in "actual emissions." Not only are those definitions consistent with the court's view of section 111(a)(4), but they also avoid the "paper offset" problem described above, thereby better serving PSD and nonattainment purposes.

E. Contemporaneous Increases and Decreases

Under *Alabama Power,* a modification is any net increase in emissions that would result form "contemporaneous" changes at a major stationary source. The court decision left to EPA the task of defining what changes should be considered "contemporaneous."

A narrow interpretation of the term "contemporaneous" would restrict creditable decreases in emissions to those occurring at the same time as the emissions increases to be offset. The administrator decided against proposing such an interpretation, since it might promote the continued operation of old or obsolete equipment in order to preserve offset credit. Instead, EPA proposed a system that would grant credit for *any* post-promulgation emissions reduction and for certain pre-promulgation emissions reductions involving recent shutdowns or production curtailments. In order to be creditable, the reductions were to be enforceable before operation of the emissions unit(s) that would result in the emissions increases (except that a 180-day shakedown period could be granted for replacements). A preconstruction notice was also proposed as a mandatory means to record any reduction credit. (For a discussion of that proposed notice requirement, see the section entitled Notification.)

On January 30, 1980 (45 FR 6802), EPA solicited additional comment on its proposal for "contemporaneous." In particular, the Administrator asked whether a three-year time limit should be imposed for qualifying reductions as "contemporaneous." The proposed three-year time cap would have run from the time of the emissions reduction to the time that the source would have filed any necessary permit application for the prospective emissions increase(s). Where a permit would have not been required, the reference time would instead be the date on which construction commenced on the change resulting in the emissions increase.

Several comments were received on the September 5 proposal. Many confused the dates for accumulation at minor stationary sources (see discussion below) with the time limits for "contemporaneous" changes at major stationary sources. The majority of commenters on the January 30 **Federal Register** notice were from the industrial sector and they urged EPA to treat *any* emissions decrease which occurs before a proposed increase as being "Contemporaneous" with that increase. EPA however, has rejected those urgings. To credit any decrease that occurs before a proposed increase would violate any common sense notion of what is "contemporaneous," since a period of contemporaneity must have some definite boundaries.

EPA agrees with those industry commenters, however, to the extent that they contended that the period of contemporaneity should be fairly large. In particular, EPA believes that the period should be wide enough so as to minimize any incentive for keeping old or obsolete equipment in operation beyond its usefulness. As a result, EPA has set five years, plus time for construction, as the period of contemporaneity for the purposes of the Part 52 PSD regulations, the Offset Ruling and the construction moratorium. Specifically, the definition of "net emissions increase" in each of those regulations provides that a decrease in "actual emissions" may be credited only if it occurs between the date five years before construction "commences" on a proposed physical or operational change and the date the increase in "actual emissions" from that change occurs. A five-year limit was selected for those regulations rather than a three-year value, since five years is frequently used as the time duration over which corporate expansion planning is conducted.

For the purposes of the Part 51 PSD and nonattainment regulations, EPA has established that each state may set the period of contemporaneity for its own NSR regulations. The state may not, however, set a period of unreasonable or undefined length.

F. Otherwise Creditable Increases and Decreases

Whether an increase or decrease in "actual emissions" is creditable for PSD or nonattainment purposes depends, not only on whether it is contemporaneous with the increase in question, but also on certain other factors. First, under each of the PSD and nonattainment definitions, a prior increase or decrease is creditable only if the relevant reviewing authority has not relied upon it in issuing a permit under the relevant NSR program. As stated earlier, a reviewing authority "relies" on an increase or decrease when, after taking the increase or decrease into account, it concludes that the proposed project would not cause or contribute to a violation of an increment or ambient standard. The purpose of that rule is to "wipe the slate clean." Once the reviewing authority has evaluated a significant net increase in issuing an NSR permit the net increase should not be a factor in deciding whether subsequent events should undergo scrutiny, too.

Second, under the PSD definition of "net emissions increase," an increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the baseline date is creditable only if it would be considered in calculating how much of an increment remains available. In formulating that definition, EPA sought to establish as close a correspondence as possible between what consumed increment and what must undergo NSR for PSD. Without that rule, some changes that *would* consume increment could escape review because of a prior decrease that was subsumed in the baseline concentration. In addition, without that rule, some changes that *would not* consume increment could have to undergo review because of a prior increase that was also subsumed in the baseline concentration.

G. The Extent to Which Increases and Decreases are Creditable

Each of the definitions of "net emissions increase" in the PSD and nonattainment regulations contains provisions which govern the extent to which a creditable increase or decrease in "actual emissions" may be credited.

The rules in each of those definitions relating to increases are simple. An increase is creditable to the extent that the new level of "actual emissions" at the emissions unit in question exceeds the old level. The old level of "actual emissions" is that which prevailed just prior to the physical or operational change which caused the increase. The new level is that which prevails just after the change.

The rules relating to decreases that are common to each of the definitions are more complex. First, a decrease is creditable only to the extent that "the old level of actual emissions or *the old level of allowable emissions, whichever is lower,* exceeds the new level of actual emissions." (Emphasis added.) Since "allowable emissions" encompasses any federally enforceable requirement, including any with a future compliance date, the underlined language prevents a company from taking credit for decreases that it has had to make or will have to make in the future. EPA concluded that to give credit for a decrease a company has had to make in order to bring an emissions unit into compliance was unwise, since together with the five-year "contemporaneous" period it would create an incentive to stay out of compliance. Furthermore, it would be contrary to the purposes of the Act and good sense to provide what is in essence a benefit for recalcitrance. Similarly, EPA concluded that to give credit for a decrease a company will ultimately have to make anyway in order to meet a requirement by a certain date would also be unwise, since it would encourage procrastination. Further, allowing decreases which fulfill preexisting requirements to be used to avoid review would undermine the purposes of the PSD and nonattainment programs by interfering with efforts to preserve or achieve attainment.

Second, a decrease is creditable only to the extent that it is "federally enforceable" from the moment that actual construction begins on the physical or operational change which causes the "actual emissions" increase in question. The purpose of that rule is to ensure that the decrease is real and that it remains in effect. The term "federally enforceable" is defined in the regulations as any limitation or conditions which EPA can enforce, such as any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved under 40 CFR 51.18 and 40 CFR 51.24.

Finally, a decrease is creditable only to the extent that it has the same health and welfare significance as the increases in question. By this provision, EPA seeks mainly to prevent an increase in emissions with considerable health and welfare significance from escaping review merely because of a contemporaneous decrease in less harmful emissions. The basic health and welfare protection purposes of the Act mandate this provision.

The definitions of "net emissions increase" in the nonattainment regulations contain a restriction on crediting decreases that the PSD regulations do not contain. Specifically, they provide that a permitting authority may not credit a decrease to the extent that any permitting authority has already accepted the decrease in satisfaction of the offset requirements of the applicable nonattainment regulations and consequently has issued a preconstruction permit to any source or modification, including the source at which the decrease occurred. The purpose of that rule is to prevent any "double crediting" of decreases in "actual emissions." Double crediting would allow air quality to deteriorate without prior review.

EPA is considering whether to introduce a provision to prevent double crediting in the PSD context. A discussion of the problem appears in the section on Increment Consumption.

H. Accumulation

On September 5, 1979, EPA proposed to continue the current policy of requiring PSD and nonattainment NSR when aggregate new emissions from individually minor units at the same stationary source, which itself was minor as of a certain date, are sufficient to require the series of changes to be treated as a major stationary source. In addition, the Administrator proposed to make the current policy consistent with the *Alabama Power* decision by applying NSR when the aggregate *net* increase in potential to emit after the applicable date qualifies it as a major stationary source (the existing rules accumulate only emissions increases and do not take decreases in account). For PSD review, the date from which emissions increases were to be aggregated was August 7, 1977, the date found in the 1978 PSD regulations. The proposed December 21, 1976 date for each of the nonattainment regulations, including the construction moratorium, marks the time when sources constructing in nonattainment areas were placed on notice that accumulation could later subject them to review.

EPA also proposed that, once a series of individually minor changes or one major change at a minor stationary source had qualified for review, the control technology assessment would focus on the last changed unit triggering review while the air quality assessment would consider all aggregated emissions.

Finally, the Administrator proposed on September 5 that accumulation would also govern the review of individual *de minimis* changes at major stationary sources. Once a source had aggregated enough emissions to make it major, a subsequent emissions increase of any size at the source would have to undergo review, unless the increase together with any contemporaneous increases or decreases of any size would qualify as a *de minimis* increase.

Twenty of the twenty-three comments received did not favor retaining the accumulation concept, even with the addition of netting. Two other commenters endorsed accumulation, but with different starting dates. Two industrial commenters claimed that accumulation cannot be legally required, since section 111(a)(4) defines modification in terms of *any change* and not a *series of changes* at a stationary source. Most other commenters agreed that neither the court nor the Act takes a position on accumulation, but they requested that the Agency not adopt or maintain such a concept. These commenters claimed that both major and minor source accumulation complicates the regulations and could eventually subject the most minor of emissions changes to review. The increase in paperwork, and the administrative strain of trying to document and report *de minimis* emissions changes, were claimed to be overwhelming, costly, and counterproductive.

These concerns might have had merit if the proposed *de minimis* emission levels had not been raised in the final regulations and the accumulation of *de minimis* changes was to continue even after a preconstruction permit had been issued. It was suggested that the general NSR procedures found in all SIPs be relied upon to effect good control for the *de minimis* or minor emissions changes, instead of accumulation. Commenters stressed that, in any event, accumulation of *de minimis* increases should run over the same time period for crediting contemporaneous reductions.

The Administrator has reconsidered the need for an accumulation rule and has decided to retain accumulation to determine if a greater than *de minimis* increase would occur at a major stationary source and to delete accumulation for aggregating changes at minor stationary sources. The primary reason for proposing accumulation at minor sources was to prevent circumvention of the regulations by the systematic construction of carefully sized emissions units which only in the aggregate would trigger review. Even though all signficant changes at a source would face reveiw once the source became major, a significant loophole was thought to exist. For example, absent an accumulation rule, a company could construct a 498-ton source without having to get a PSD permit by constructing first one-half of it and then subsequently the other half. The Administrator, however, does not find adequate support in the Act for applying PSD review to the change at a minor source which would make the source major. Section 165 applies only to major emitting facilities on which "construction" commences after a specified date, where the term "construction" includes "modification." Similarly, section 172(b)(6) requires permits for the construction of new or modified major stationary sources. EPA believes that, in general, PSD and nonattainment review cannot be applied to a modification unless it would occur at a source that is already major. The one exception to this rule is where a proposed addition to an existing minor stationary source would be major in its own right. Such construction is equivalent to a new major stationary source and should therefore be subject to PSD and nonattainment review. A new subsection in each of the PSD and nonattainment regulations embodies that view.

In general, under the promulgation announced here a series of minor changes at the same minor stationary source will not be accumulated. On the other hand, a series of individually *de minimis* changes at a major stationary source would be accumulated within a contemporaneous time frame to see if a review would be required. This is reflected in the definitions of "net emissions increase" in the PSD and nonattainment regulations. Plainly, a series of individually *de minimis* increases in emissions in the aggregate deteriorate air quality significantly.

I. Restrictions on Construction

EPA proposed that the netting of emissions changes would not be permitted in areas subject to construction restrictions under section 110(a)(2)(I) or 173(4). EPA based this proposal on an interpretation that Congress intended all forms of offsets to cease after June 30, 1979, in the absence of an approved Part D plan. This policy would also have promoted the timely submittal of attainment plans and prevented the nonattainment problem from growing worse while the plan was being developed. The Administrator believed that sources might convert reductions later needed for attainment into offsets before the plan requiring those reductions could be adopted and approved.

Thirty-two of thirty-five commenters said that the proposed "increase only" approach was unacceptable. No substantial support was given by the three that favored it. Several questioned the legality of the proposed interpretation and claimed that *Alabama Power* authorized only a netting approach, despite any programmatic sense that another approach might have. Several asserted that EPA's proposal would discourage early cleanup and actually perpetuate the existing air quality problem.

The Administrator has reconsidered the interpretation that led to the proposal of the "increase only" approach for carrying out the growth restrictions and concluded that the *Alabama Power* decision does not support it. Thus, in the final rules promulgated today, a major stationary source can construct in a growth restricted area, if sufficient contemporaneous, creditable net reductions are found (subject to the limitations on reconstruction described below).

J. Reconstruction

In the September 5, 1979 proposal, a reconstruction (roughly, improvements at an existing source which equal 50% or more of the capital cost for replacing the source) was to be treated as if it were a new source for purposes of NSR under both PSD and nonattainment rules. Under the proposal, a reconstructed major stationary source would be subject to review regardless of any contemporaneous emissions reductions that would occur at the same source. The Administrator proposed this approach in accordance with Congressional intent to subject new construction in nonattainment areas to requirements such as meeting the lowest achievable emission rate (LAER), even though a replacement of an older unit would result in a net reduction from previous emission levels (*see* 123 CONG. REC. 13702, col. 2 (daily ed. August 4, 1977) (statement of Senator Muskie)). In the agency's view nonattainment areas require very stringent NSR Procedures to overcome the inertia of the nonattainment problem. Having a reconstruction provision would promote maximum air quality improvements from an area's limited reduction capability by requiring more construction projects to meet LAER and bring other sources in the State under common control into compliance with the SIP.

The reconstruction rule was also proposed for PSD in an effort to be consistent with nonattainment NSR. Although the Administrator recognized that the air quality rationale for having reconstruction in nonattainment areas was considerably stronger than that for PSD inclusion, it was believed that less confusion would result with a parallel application of the reconstruction rule.

All ten commenters on the reconstruction topic voiced general disapproval for the proposal. Eight of the ten favored dropping the concept entirely from both sets of regulations, with the remaining two requesting that its applicability be restricted. They advised that EPA should rely instead on the reconstruction provisions of NSPS and NESHAP to ensure such construction would apply adequate control technology. Commenters complained that review criteria based solely on the replacement cost of equipment regardless of air quality improvements make little sense for NSR rules charged with safeguarding air quality. They further argued that the added regulatory complexity inherent to the inclusion of a reconstruction provision was not warranted and its addition to NSR would not be consistent with the "no net increase" exemption under *Alabama Power*.

The Administrator agrees that the reconstruction requirement makes only limited air quality sense for PSD and has reconsidered the need to retain this concept for the program. It is true that a reconstructed source not otherwise subjected to PSD review as a major modification (i.e., such source would not cause a significant net emissions increase) would not interfere with the PSD air quality objective of allowing only limited deterioration of existing air quality. On the other hand, the PSD objective of maximizing future use of the allowable increments through application of best available control technology (BACT) would not be strictly met. Nevertheless, the Administrator believes that the general PSD objective of safeguarding existing air quality from significant degradation will not be undermined by deleting the requirement for review of reconstructions.

The proposal would have implemented reconstruction for PSD only on a plant wide basis. Thus, an entire plant would have to be reconstructed in order for it to be subjected to PSD review as a reconstruction. Few instances of plantwide reconstruction are expected. The limited applicability under PSD brings further doubt as to the real need for the added complexity that a reconstruction provision would bring to determining the permit applicability of construction projects. Furthermore, the deletion of reconstruction from PSD would avoid some increment tracking problems; treating reconstruction as new PSD sources could lead to increment consumption unrelated to actual air quality changes.

The Administrator does not agree with the commenters who argued that applying "reconstruction" in nonattainment areas would bring unwarranted complexity and no air quality benefits. As explained in the proposal, EPA believes that the reconstruction provision within nonattainment NSR rules is consistent with stated Congressional intent and programmatic goals to get reasonable air quality improvements from each major construction activity. Since *Alabama Power* did not strictly bind EPA in nonattainment concerns and since the reconstruction concept was not expressly precluded, the Administrator has determined that reconstruction is warranted in nonattainment areas and is today promulgating this concept as proposed for nonattainment NSR rules.

Commenters also asked that several exemptions be considered if a reconstruction rule were promulgated. Among the exemptions suggested were: (1) current NSPS exemptions for modifications, (2) Fuel-Use Act exemptions, (3) involuntary replacement of damaged equipment, and (4) voluntary fuel switches. The Administrator is not promulgating any of these exemptions into the reconstruction provision. First, the current NSPS exemptions and involuntary replacement of damaged equipment do not avoid applicability of NSPS under 40 CFR 60.15 when a unit would have been reconstructed. Therefore, it would be inconsistent to establish such a concept under nonattainment NSR. In addition, 40 CFR 60.15, which governs how the reconstruction rule will apply in the affected NSR programs (*see e.g.*, 40 CFR Part 51 Appendix S, section II. A(12)), allows the Administrator, in paragraph (f), some case-by-case discretion in determining when a reconstruction would occur. Thus, no specific exemptions such as those suggested appear warranted at this time.

K. Exclusions

In September, EPA proposed to exclude "routine maintenance, repair and replacement" from the category "physical change" which appeared in the proposed PSD and nonattainment definitions of "major modification." At the same time EPA proposed to exclude the following events from the category "change in method of operation," unless previously limited by enforceable permit conditions: (1) a fuel switch due to an order under the Energy Supply and Environmental Coordination Act of 1974 (ESECA) (or any superseding legislation) or due to a natural gas curtailment plan under the Federal Power Act; (2) a voluntary switch to an alternative fuel or raw material that the source prior to January 6, 1975, was capable of accommodating; (3) a fuel switch due to an order or rule under section 125 of the

Clean Air Act; (4) a switch to "refuse derived fuel generated from municipal solid waste" (RDF), and (5) a change in the ownership of a source.

EPA received few comments on the proposed exclusions. Certain commenters expressed reservations about the legal and policy basis of the RDF exclusion. Another commenter urged EPA to expand the exclusion for voluntary switches to an alternative fuel or raw material. Specifically, the commenter urged the Agency to drop the provisions which limited the exclusion to switches that would not require a change in permit conditions and to sources that were capable of accommodating the fuel or material before January 6, 1975. The commenter agreed with the position EPA took in the preamble to the 1978 Part 52 PSD regulations that Congress in enacting section 169(2)(C) intended that voluntary switches to an alternative fuel or raw material should be treated in the same way that they were being treated under section 111. *See* 43 FR 26396 (June 19, 1978). At the time Congress enacted section 169(2)(e), the regulations promulgated under section 111 excluded any such switch if the source could accommodate the fuel or material before the relevant NSPS applied to the source type. Whether a permit condition would restrict the switch was immaterial. *See* 40 CFR 60.14(e)(4) (1979). In view of this, the commenter argued that Congress intended the exclusion in the PSD and nonattainment regulations to look only at whether the source was capable of accommodating the fuel or material before those regulations first applied to it.

After considering the comments on the RDF exclusion, EPA has decided to promulgate it. The Resource Conservation and Recovery Act of 1974, 42 U.S.C. 3251 *et seq.*, firmly supports the exclusion. In that statute, Congress expressed a strong interest in the development and use of RDF. In addition, the exclusion has a sound policy basis, in view of the importance of reducing the nation's dependence on foreign oil.

In promulgating the exclusion, however, EPA has drawn it, by way of clarification, somewhat more tightly. It now excludes only a switch to RDF by a "steam generating unit." EPA intends that term to have the same meaning for the purposes of PSD and nonattainment NSR as it does for the purposes of the new NSPS for certain electric utility "steam generating units." For the NSPS definition of that term, see 40 CFR 60.41a (1979).

In response to the comment on the voluntary fuel and raw material switch provision, EPA has retained the language which limited it to sources which were capable of accommodating the fuel or material before January 6, 1975 (or December 21, 1976, for the Offset Ruling and 40 CFR 51.18; or July 1, 1979, for the construction moratorium) and the language which limited the exclusion to those not requiring a permit alteration. First, EPA disagrees that the cutoff date in the counterpart NSPS exclusion is analogous to the date the particular preconstruction permit regulations applied to a particular source. To the contrary, the NSPS counterpart is more broadly drawn; it focuses on the date the NSPS first applied to the *source type*. Second, EPA disagrees that the counterpart governs whether the NSR exclusions must ignore permit conditions. The NSPS program does not involve assessments of the impact of a source on air quality. In EPA's view, any switch to another fuel or raw material that would distort a prior assessment of a source's air quality impact should have to undergo scrutiny.

It should be noted that EPA has added a new clause to the exclusion for voluntary fuel switches. It provides that a switch which the relevant reviewing authority has already approved is not a "physical change" or "change in the method of operation" for NSR purposes. Obviously, a second evaluation of the air quality impact of the switch would be unnecessary.

The comment relating to voluntary switches has prompted EPA to add one more exclusion. It would exclude any increase in hours or rate of operation, as long as the increase would not require a change in any preconstruction permit condition established under the SIP (including PSD permits) after the relevant date of concern.

This exclusion stems largely from EPA's decision that the definitions of "major modification" should focus on changes in "actual emissions." While EPA has concluded that as a general rule Congress intended any significant net increase in such emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to get a NSR permit before it could lawfully change hours or rate of operation. Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions. The emphasis of the relevant statutory provisions on "construction" strongly supports EPA's interpretation of Congress' intent. *See, e.g.*, section 165(a), 42 U.S.C. 7475. At the same time, any change in hours or rate of operation that would disturb a prior assessment of a source's environmental impact should have to undergo scrutiny.

Because of the absence of any significant comments on the other four exclusions, EPA has promulgated them as proposed.

L. Example of How the Definitions Work

The way in which the definition of modification works is best illustrated by an example. The example also demonstrates the relationship among a source's potential to emit, its actual emissions, and its allowable emissions.

In December 1980, a new source (Source A) that will emit SO_2 and PM files a PSD application to locate in an area that is attainment for SO_2 and PM. At maximum operating capacity including application of best available control technology, and assuming year-round continuous operation, the source can emit 700 tons of SO_2 per year. Seven hundred tons per year (tpy) is the source's physical potential to emit SO_2. Its physical potential to emit PM is 15 tpy. Provided that the 15 tpy of PM emissions is made federally enforceable, PM emissions will not be significant (*i.e.*, less than 25 tpy) and are, therefore, not subject to PSD review.

In the course of review, modeling reveals the SO_2 increment will be violated in the source's area of impact if it emits 700 tons SO_2 per year. The source, therefore, decides to limit its operation so as to decrease its emissions to 600 tons SO_2 per year. This reduction proves sufficient to eliminate the predicted violation. The source is issued a PSD permit that sets an SO_2 emissions limitation of 600 tpy, which reflects the revised source operation (approximately 20 hours a day, seven days a week). This emissions rate is the source's legal potential to emit. It is also the source's allowable emissions, since it is the emissions rate specified as a federally enforceable permit condition. *See e.g.*, § 52.21(b)(15)(iii).

During the first three years of operation, from March 1982 to March 1985, the demand for the source's product is less than anticipated. As a result, the source's actual emissions are 250 tpy during the first year and 300 tpy during the next two years.

In April 1985, another new source of SO_2 (Source B) proposes to locate in the area of impact of Source A. Consequently, in calculating its impact on ambient standards and its increment consumption, Source B is required to model the emissions of Source A. Under EPA's increment consumption policy (*see* Increment Consumption), Source

A's actual emissions should be modeled. Because Source A has an individually-tailored PSD permit, the definition of actual emissions allows the reviewing authority to presume that the allowable emissions in Source A's PSD permit reflects its actual emissions, unless the reviewing authority or source applicant has reason to believe that allowable emissions are not representative of actual source emissions.

In the case of Source A, allowable emissions, in fact, differ from actual emissions. Assuming that the reviewing authority is aware of this difference as a result of its periodic assessment or because Source B has presented this information in its application, Source A is modeled at its actual emissions rate representative of normal source operation during a two-year period preceding the date of concern. In this case, the date of concern would be approximately the date Source B submits its application. The reviewing authority should, therefore, look to the two-year period preceding that date unless that period of time was atypical of normal source operation. For Source A, the two-year period preceding Source B's application can be considered representative of normal source operation. Source A's actual emissions during that period, on an average annual basis, are approximately 300 tpy. The modeling of increment consumption for Source B should assume that emissions rate for Source A.

Unless Source A's permit is revised at this point to reflect its actual emissions rate of 300 tpy, Source A could attempt to use the decrease in its actual emissions in the future to offset a future emissions increase of its own. This would result in a large net increase in actual emissions for the area which could violate the applicable PSD increment. The potential problem of double counting of emissions decreases is discussed in more detail in Increment Consumption.

Assume that in June 1987, Source A decides to modify its facility. Demand for its product has increased and Source A wants to add a new emissions unit that will emit 60 tpy SO_2. In addition, Source A plans to increase the hours of operation at the units which began production in March 1982, to result in an actual emissions increase of 75 tpy at those units. If no contemporaneous decreases have occurred, both changes will result in significant net increases in actual emissions. Both changes then qualify as modifications. The addition of a new unit is a physical change. The increase in hours of operation is a change in the method of operation, assuming that the reviewing authority revised Source A's permit to reflect its actual emissions of 300 tpy at the time Source A's actual emissions were used by Source B in modeling increment consumption.

If Source A was able to decrease sufficiently its actual emissions at another unit at the source, it would be able to avoid PSD review for one or both modifications. Assume, for example, that in April 1986, Source A applied additional control equipment and decreased actual SO_2 emissions across the facility by 100 tpy. In June 1987, Source A can use those decreases to offset its proposed contemporaneous increases provided the decreases are made federally enforceable. If Source A's proposed increase in hours of operation for the units which began operation in March 1982 would result in an emissions increase of 75 tpy and the emissions from the proposed new unit are 60 tpy, Source A can use its 100 tpy decrease to avoid PSD review for both changes. Seventy-five tons of the decrease can be used to offset the increase in hours of operation and 25 tons of the decrease can offset 25 tons of the increase due to the new unit. Since the net emissions increase of 35 tons is not significant, it would not be a major modification requiring PSD review.[13]

Suppose Source A then plans to increase its emissions by 150 tpy in November 1990 and to decrease emissions by 80 tpy in February 1989. The increases and decreases since April 1986 are all contemporaneous because they occurred within the same five-year period. Now, assume Source A revises its permit to reflect only 50 tons of the 80-ton decrease in February 1989. Source A can receive credit for only 50 tons of the 80-ton decrease, since only this amount was made federally enforceable. However, Source A does receive credit for the April 1986 decrease of 100 tpy, assuming that decrease was made federally enforceable at the time of the June 1987 increase, or is made federally enforceable prior to commencement of construction on the November 1990 increase. Source A's total creditable decreases are then 150 tpy. Its increases are 135 tpy in June 1987 and 150 tpy in November 1990, for a total increase of 285 tpy. The net emissions increase is 135 tpy, which is significant for SO_2. Source A must get a PSD permit for the change leading to the 150 tpy increase in November 1990. However, it is not required to get a PSD permit for the June 1987 increases.

If, from March 1982 to March 1985, Source A had exceeded its allowable rate of 700 tpy, Source A could not receive full credit for its April 1986 decrease. For example, assume Source A's actual emissions from March 1982 to March 1988 were 800 tpy, 100 tpy over its allowed rate. None of the 100 tpy reduction in April 1986 would then be creditable. The amount of Source A's creditable decrease could also be reduced if the designation of the area where Source A is located were changed from attainment to nonattainment in March 1985 and Source A became subject to a new, more stringent SIP requirement in March 1986. If, for example, the SIP required Source A to reduce emissions from 700 to 600 tpy by December 1988, none of the 100 tpy decrease in April 1986 would again be creditable.

XI. De Minimis Exemptions

In the *Alabama Power* decision, the court indicated that emissions from certain small modifications, and emissions of certain pollutants at new sources, could be exempted from some or all PSD review requirements on the grounds that such emissions would be *de minimis*. In other words, the Administrator may determine levels below which there is no practical value in conducting an extensive PSD review. The court also indicated that the Agency could establish exemptions based on administrative necessity (e.g., the inability of reviewing authorities to provide the necessary work force to properly review a very large number of permit applications). The September 5 proposal incorporated the *de minimis* concept and requested comments on the approach taken. At that time, the Administrator noted that because of the urgency associated with the proposal, the *de minimis* numbers published were not supported by extensive analysis, and that a more thorough analysis would be undertaken prior to promulgation.

The proposal included two tables, one for defining significant emissions changes (in tons per year) and one for defining significant air quality changes (in micrograms per cubic meter). Values lower than those in the proposed tables were recommended as being *de minimis*. These tables, with respect to criteria pollutants, were generally based on the "significance" levels published in the preamble to the June 19, 1978 PSD regulations (43 FR 26398) and in the Offset Ruling (44 FR 3283). These significance levels in turn were derived from the Class I increment values listed in Part C of Title I of the Clean Air Act. For noncriteria pollutants, a similar approach was taken: the Agency extrapolated emissions rates from documented air quality guideline numbers, where available.

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[13] Under the provisions of 40 CFR Part 51 Appendix S, 40 CFR 51.18(j), and 40 CFR 52.24, the emissions increases at Source A would probably be subject to review as modifications, notwithstanding the contemporaneous decreases at the source.

In the proposal, the tables were presented as preamble guidelines to be used in the following manner. For PSD, any new source subject to review was to be analyzed for the application of BACT for each pollutant whose emissions would exceed the value in Table 1. In addition, an air quality analysis to determine the impact of these pollutants was required. For modifications, any pollutant for which the source was major and for which there was a contemporaneous net increase equal to or greater than the applicable value(s) in Table 1 would trigger PSD review of the modification; as in the case of new sources, BACT and air quality impact analyses were required for each pollutant whose net emissions increased by greater than a *de minimis* amount. Table 2 was proposed to provide an exemption from air quality impact analysis (including monitoring) for those sources and modifications which could demonstrate that their maximum expected air quality impact would be less than the values listed. Sources, including modifications, claiming to be exempt from reviews on the basis of *de minimis* emissions would be required to so notify the Administrator. The *de minimis* requirements also would apply to nonattainment sources, but would be restricted to the pollutant(s) for which the area is nonattainment.

The Agency received extensive comments on the proposed *de minimis* approach. In all there were 121 comments addressing this issue. While there was almost universal endorsement of the concept, a large number of commenters (65) criticized the proposed values as being too low. Some of these commenters stated that there was a lack of support for the numbers presented and felt that the emissions table was more restrictive than the table of air quality concentrations; others claimed that the low *de minimis* levels made the applicability of the review process inequitable for modifications in comparison to new sources. A consistent theme was that the proposed values would necessitate unproductive review in terms of environmental benefit while consuming applicant and reviewing authority resources. Although there were suggestions concerning how big the emissions numbers should be (100 tons per year was a popular choice), little specific guidance was given on how to develop alternative numbers. Suggestions generally were limited to using various percentages of the national ambient air quality standards or the amount of existing emissions. One commenter did suggest the use of an equation that accounted for variability in stack height.

Only one commenter criticized the *de minimis* levels for being too high. This commenter also believed that exemptions from review because of emissions less than the *de minimis* rate should not be automatic, but should be allowed only after a case-by-case review of source impact. In addition, the commenter stated that in areas where the increment is almost entirely consumed, sources should be subject to PSD review for any increase in emissions.

A frequently addressed aspect was the perceived need to incorporate any *de minimis* values in the regulations, as opposed to leaving them as guidelines in the preamble. Forty-eight of fifty-six commenters favored such a change. The general concern was that since the preamble is omitted from the Code of Federal Regulations, the regulations as written would appear to be ambiguous as to the term "significant." Those that favored leaving the tables as guidelines did so generally to provide more flexibility either for sources to demonstrate that they should be exempt or for states to develop alternative *de minimis* values.

There were several other meaningful comments. Sixteen commenters recommended that *de minimis* coverage be limited to criteria pollutants. Eighteen commenters contended that the need to accumulate *de minimis* changes was burdensome, environmentally unnecessary, and should be dropped; some questioned the legislative basis for this requirement. Several commenters cited the difficulty, if not impossibility, of monitoring for all regulated pollutants. These commenters were especially concerned regarding monitoring for noncriteria pollutants, indicating that the requisite technology was not available in some cases. Other commenters questioned how the term "no impact," which is used in the regulations to protect Class I areas, relates to the Table 2 *de minimis* values.

Mindful of the comments received, the Administrator has undertaken a reassessment of the *de minimis* issue. This reassessment is decribed in two documents. One is a report entitled "Impact of Proposed and Alternative *De Minimis* Levels for Criteria Pollutants," EPA-450/2-80-072, and the other is a staff paper entitled "Approach to Developing *De Minimis* Values for Noncriteria Air Pollutants." These are available for examination in the rulemaking docket. In addition, copies may be obtained by writing to the Air Information Center, U.S. EPA Library Services, MD-35, Research Triangle Park, NC 27711.

Obviously, a significant part of the reassessment involved the use of reasonable judgment. The task requires consideration of an area in which not only is data limited, but criteria for decision making is almost non-existent. The first task of the reevaluation was to identify the basic objectives to be met in selecting *de minimis* values. The primary objectives identified were: (1) provide effective Class I area protection; (2) guard against excessive "unreviewed" consumption of the Class II or III increments; and (3) assure meaningful permit reviews. "Meaningful" in this context implies that there would be a possibility of obtaining useful air quality information or obtaining greater emission reductions as a result of BACT analysis than would be expected from normal state permit or NSPS/NESHAP processing.

The proposed *de minimis* air quality values, which stemmed from the legislated Class I increments, caused concern for two reasons. First, if a modification occurs near enough to a Class I area, almost any *de minimis* emissions level could impact the area. Thus, proximity rather than emissions level appears to be more important in Class I area protection. Second, the general imposition of Class I criteria on the review process for Class II and III areas may be overly stringent. These concerns were examined as part of the *de minimis* reassessment.

As a result of this examination, the Administrator has decided that higher *de minimis* emissions rates than those used in the proposal could apply to review of sources which would not construct within a specified distance of a Class I area. However, a proposed source or modification that would construct close to a Class I area must be prepared to demonstrate for each regulated pollutant that it would emit that it would not have a significant impact on such area (defined as one microgram per cubic meter (μg/m3) or more, 24-hour average), even if the proposed emissions increases are below the applicable *de minimis* threshold. The effect of this change is to require less review for many sources through higher *de minimis* values (compared to the proposal), while adding a limited air quality analysis requirement for only a few sources. Such a change is consistent with the objectives of protecting Class I areas while limiting PSD review to projects with significant impact.

There were three basic alternatives available for specifying *de minimis* cutoffs—one based solely on air quality impact, one based solely on emissions rate, and one based on a combination of these, such as was proposed on September 5. The Administrator has chosen to specify *de minimis* cutoffs in terms of emissions rate for applicability, BACT and air quality analysis purposes, with no provisions for case-by-case demonstration of a source's air quality impact. This is a departure from the proposal in that, as proposed, a source could avoid air quality analysis requirements for a given pollutant by demonstrating that it would produce a maximum impact less than the air quality concentrations listed for that pollutant. An air quality concentration *de minimis* level for each pollutant for which measurement methods are available is included in the regulations only for the purpose of providing a possible exemption from monitoring requirements.

This approach has been adopted for several reasons. First, the Congress specified emissions rates, not projected air quality impacts, in the Clean Air Act as the criteria for determining which sources are major and therefore subject to PSD review. Moreover, the court, in the *Alabama Power* decision, continually refers to emissions rate rather than air quality concentration in its discussion of the *de minimis* issue. Therefore, it would be inconsistent with the existing guidance to abandon the emissions rate concept.

Second, if applicability decisions depended on confirming a demonstration by the source that its impact would be less than a given air quality level, it is the Administrator's opinion that the review process would become excessively complex and greatly increase the resources needed by reviewing authorities to carry out the program. In addition, such an approval would create and atmosphere of uncertainty as to whether individual sources needed to apply for a permit or not, and could lead to uneven application of the regulations from state to state. Third, the task of establishing *de minimis* air quality levels for noncriteria pollutants, with proper consideration of threshold levels and factors of safety (if any), is very complex and could not be done in the time available.

Finally, given the inclusion of a *de minimis* exclusion for monitoring, it serves little purpose to have a separate table to permit an exclusion from the remaining air quality impact analysis requirement. (A separate table would be required because monitoring capability and concern for potential effects are unlikely to be associated with the same air quality concentrations.) Besides making the regulations more complicated, this resultant demonstration necessary to earn an exemption from air quality impact analysis would in itself *be* an air quality impact analysis.

In analyzing the basis for *de minimis* emissions rates, it was apparent that two distinct classes of pollutants were involved. The first consists of the criteria pollutants for which extensive health and welfare information has been developed and documented in the respective criteria documents. The other class consists of the noncriteria pollutants for which, as the name implies, no criteria on ambient effects exist. Rather, these pollutants are covered by either New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP), both of which are based on a national emissions standard, rather than an air quality management approach. That is, the regulations developed pursuant to both these legislative requirements generally specify emissions limitations and/or equipment performance standards as opposed to threshold air quality levels that must be achieved as for the criteria pollutants. Thus, it appeared reasonable to develop *de minimis* cutoffs from separate perspectives—to base criteria pollutant *de minimis* emissions cutoffs on air quality "design values" and to base the noncriteria pollutant *de minimis* values on the emissions rates embodied in the NSPS and NESHAP.

The first step in developing *de minimis* emissions rates for the criteria pollutants, therefore, was the establishment of air quality "design values." Such design values were then converted to emission rates in accordance with EPA modeling procedures,[13] using data on sources permitted under the PSD program. The latter provided modeling parameters associated with sources of the type expected to be most affected by the *de minimis* requirements. Ambient concentations representing percentages of the primary 24-hour air quality standard, as well as percentages of the Class II increment, were evaluated for particulate matter (PM) and sulfur dioxide (SO_2). Similarly, various percentages of the primary standard for the other criteria pollutants were examined.

The primary standard was chosen as the basis for design values because, except for PM and SO_2, none of the criteria pollutants have a secondary standard that is different than the primary standard. The 24-hour standard instead of the annual standard was used for PM and SO_2 since short term rather than the long term impact tends to be the controlling factor in determining whether air quality increments are exceeded. In addition, levels higher than five percent of the primary standard were not seriously considered because that percentage equates to approximately 35 percent of the TSP Class II increment. The Administrator does not believe that a source which, due to its own emissions, could potentially consume more than that amount of increment should be exempt from review.

Two factors had an important influence on the choice of *de minimis* emissions levels within the resulting range of annual emissions rates. The primary one was the cumulative effect on increment consumption of multiple sources in an area each making the maximum *de minimis* emissions increase (thereby going unreviewed under PSD at the time of the change). The other, and secondary one, was the projected consequence of a given *de minimis* level on administrative burden. To determine the cumulative effect on increment consumption expected from several sources, all making maximum *de minimis* increases (a rather unlikely event) in the same area, actual source distributions in the Dayton, Ohio, area were used. Dayton was chosen because it is a fairly representative industrialized community, and source data suitable for modeling was readily available. To check the impact of the various *de minimis* levels on administrative burden, data from past permitting experience were again used, in this case to prepare curves showing the number of sources expected to require review at various *de minimis* emissions levels. A description of these analyses is found in the *de minimis* report on criteria pollutants cited earlier.

As a result of the reevaluation, the Administrator has decided to use four percent of the 24-hour primary standard as a design value for both PM and SO_2. These ambient levels correspond to emissions rates of 25 tons per year for PM and 40 tons per year for SO_2 (except for lead, all emissions rates predicted from the modeling for criteria pollutants were rounded to the nearest five tons).

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[13] Guidelines for Air Quality Maintenance Planning and Analysis, Volume 10 (Revised): Procedures for Evaluating Air Quality Impact of New Stationary Sources, OAQPS No. 1.2-029R, October 1977.

Four percent of the lead standard was also used, yielding an emissions rate of 0.6 tons per year. The emissions rate for carbon monoxide (CO) in all cases was greater than 100 tons per year, the limit set in the Clean Air Act to define major for many source categories. Therefore, as proposed, the *de minimis* emissions rate for CO is established at 100 tons per year.

Because the nitrogen dioxide standard is expressed only as an annual average, a factor of two percent was used to determine the design value. There were two reasons for this decision. First, for a given level of emissions, a predicted annual concentration will be smaller than a short-term value. Conversely, therefore, a lower percentage for the annual standard than for a shorter term standard is indicated if one is to maintain a reasonably consistent rationale for emissions rates. Second, the emissions rate corresponding to two percent of the standard is 40 tons per year, which is comparable to the rate established for SO_2. Both these pollutants are frequently emitted from the same source, in roughly equivalent amounts; for example, a typical power plant meeting the NSPS with low sulfur coal would emit about 1300 tons per year of nitrogen oxides and about 1500 tons per year of SO_2.

Finally, models for use in establishing a relationship between individual source hydrocarbon (VOC) emissions and ozone concentrations are not presently available. Thus, it was not possible to model an emissions rate from an air quality design value. However, in view of the link between VOC and NO_x emissions in the formation of ozone, the emissions rate for VOC was also set at 40 tons per year.

It should be recognized that several sources or modifications can be allowed in the same area even though each might consume up to four percent of the standard (about 16 percent of the Class II increment for SO_2 and about 28 percent for PM). This is because the source specific concentration occurs in only a limited area (often one point) and the temporal and spatial conditions which lead to maximum consumption by one source are seldom the same for other sources that may be making similar *de minimis* changes. To reinforce this understanding, a modeling analysis of 37 sources in the Dayton area was conducted. The maximum aggregate increment consumption projected to occur as a result of all major sources each making a *de minimis* emissions increase equal to 40 tons per year (*e.g.*, that for SO_2) was less than 1.5 µg/m3 on a 24-hour basis. While representative of only one set of conditions, this result could probably be expected in most industrialized areas.

Excessive increment consumption is unlikely, given the safeguards existing in the regulations. Although such sources would not get PSD permits, they do not go unreviewed. Most, if not all, will be permitted under ongoing state NSR programs pursuant to 40 CFR 51.18. Moreover, their contribution to increment consumption will be evaluated either by the next major source undergoing PSD review, or during the periodic assessment of source growth. Nevertheless, in atypical situations there might still be concern with the *de minimis* levels causing accelerated increment consumption. This can be controlled by a state, upon taking the program, through the establishment of smaller *de minimis* levels.

To determine a proximity cutoff that gives assurance of protection of Class I areas, a modeling analysis was performed to identify the effect of the *de minimis* emissions levels on such areas using Volume 10 screening procedures. For the purpose of this analysis, the effect of varying stack height and meteorology, as well as the influence of terrain features, was considered. Significant impact was taken to be one $\mu g/m^3$, 24-hour average. The results indicate that sources locating more than 10 kilometers from a Class I area would not have such an impact as a result of making *de minimis* changes. Therefore, the regulations promulgated here require that any new or modified major stationary source within that distance from a Class I area will be subject to review if the source would have an impact on the area equal to or greater than one $\mu g/m^3$, 24-hour average. It must be pointed out that while the preceding responds to those commenters concerned about how to judge whether a source has "no impact" on a Class I area, the analysis of impact on such an area from major sources subject to PSD review must be done on a case-by-case basis. Further, such sources may be subject to an evaluation by the appropriate Federal Land Manager as described in the regulations.

Noncriteria pollutant emissions rates were developed from the existing emission standards (NSPS and NESHAP). In general, a fraction of the applicable standard was used. In the Administrator's judgment, since the NSPS represents the best adequately demonstrated control technology on a nationwide basis, and the NESHAPs are established with an ample margin of safety to prevent unreasonable risk to the public health from hazardous pollutants, a small percentage of these standards would, for PSD purposes, prevent a significant change from escaping review.

Levels generally representing 20 percent of a NSPS emissions standard and, because of their greater impact on health, ten percent of a NESHAP emissions standard, were evaluated. The air quality impacts of the resulting NSPS emissions rates were then calculated in a manner similar to that used for the criteria pollutants. These concentrations were compared to available health and welfare data to assure that significant adverse effects were avoided. In the case of fluorides, this check resulted in a reduction of the emissions rate originally indicated. No adjustment based on resultant effect was made for the hazardous pollutants since the NESHAP emissions rate, as noted above, is itself intended to protect the public health with an ample margin of safety; therefore, ten percent of such a value is in the Administrator's judgment sufficiently stringent for use as a *de minimis* level.

A brief discussion of the rationale for each noncriteria pollutant emissions rate is given below. For more information, see the staff paper cited earlier.

Hazardous Pollutants (NESHAP):

Asbestos—Reevaluation of existing data indicates that trying to establish a quantitative link between emissions and potential effects is not possible. No level of exposure can be presumed *de minimis*. Therefore, a theoretical *de minimis* emissions rate of zero was considered. Such a value is not practical, however, since changes of any kind at sources using materials containing even traces of asbestos could trigger review regardless of the amount of asbestos emitted. Therefore, an estimate was made of the emissions from well controlled sources from which asbestos can be emitted. Although data is very limited, rough estimates of emissions from four source categories were developed. Three categories are covered by the NESHAP regulations: asbestos milling, manufacturing using asbestos in the process (e.g., textiles, asbestos tile), and asbestos asphalt manufacture. Rock crushing, a fourth category not covered by the NESHAP, was also examined. Emissions rates from these four categories, using available data, were respectively 0.2 tons per year (TPY), 0.07 TPY, 0.04 TPY, and 0.06 TPY. Because asbestos is carcinogenic, a conservative approach to establishing the *de minimis* emissions rate has been taken. The *de minimis* level is based on a source category which has relatively small asbestos emissions, and which includes the majority of asbestos emitting sources—manufacturing operations using asbestos. Therefore, the promulgated asbestos *de minimis* rate is 0.007 TPY, based on ten percent of the emissions estimated from asbestos manufacturing sources.

Beryllium—The NESHAP emissions rate is ten grams per day or 0.004 tons per year. Ten percent of this yields a *de minimis* emission rate of 0.0004 tons per year.

Mercury—The NESHAP emissions rate is 2300 grams per day which equates to approximately one ton per year. At ten percent, the promulgated *de minimis* emissions rate is 0.1 tons per year.

Vinyl chloride—The NESHAP standard is expressed in parts per million of the effluent stream. It was therefore necessary to assume model plant characteristics in order to develop expected emissions from a well controlled plant. As in the case of asbestos, the Administrator believes that it is prudent to base these calculations on a small model plant considering the suspected carcinogenicity of this pollutant. Such plants, well controlled, emit about 10 tons per year. Based on this value, the promulgated *de minimis* emissions rate is one ton per year.

NSPS Pollutants:

Fluorides—The proposed *de minimis* emissions rate for fluorides was extremely conservative, and was strongly criticized as being too low by several commenters. Upon reevaluation, the Administrator agrees with the comments. A *de minimis* emissions rate based on the NSPS for aluminum plants is 30 tons per year—a well controlled, moderate sized, plant emits about 150 tons per year of fluorides. At a rate of 30 tons per year, the predicted maximum 24-hour ambient concentration is approximately ten micrograms per cubic meter. That concentration is about ten times the level that has been observed to produce effects on vegetation (about one microgram). In order to limit the potential for such damage, a *de minimis* emissions rate of three tons per year, corresponding to a one microgram impact, is promulgated.

An alternative would have been to base the emissions rate on the NSPS for phosphate fertilizer plants. Fertilizer plants typically emit much less than aluminum plants (i.e., about two tons per year controlled). A 20 percent *de minimis* value would then be less than 0.5 tons, which is unrealistic in view of other sources such as aluminum plants. Moreover, changes at a fertilizer plant that resulted in a fluoride emissions increase of 0.5 tons per year would probably get reviewed under state new source review and/or NSPS requirements.

Sulfuric Acid—A model plant of 1300 tons per day of production was used. The NSPS emissions limit is 0.15 pounds of sulfuric acid per ton of product processed. Thus, the model plant would emit about 35 tons per year. This yielded a *de minimis* emissions rate of seven tons per year using the 20 percent factor.

Total Reduced Sulfur, Reduced Sulfur—These pollutant classes include hydrogen sulfide (H_2S) and are regulated primarily to avoid nuisance (odor) problems. Total reduced sulfur (TRS) emissions are based on a representative kraft pulp mill (900 tons of pulp per day) which at 20 percent yields a *de minimis* emissions rate of 10 tons per year. Similarly, using a model refinery of about 100 long tons per day, the reduced sulfur (RS) compound emissions rate is 10 tons per year.

(The emissions rates calculated on the above model plants were 8.3 tons per year for TRS and 9.4 tons per year for RS. Both values were rounded to 10 tons per year for administrative purposes.)

Hydrogen Sulfide—Regulated under the refinery NSPS only. Specified as one thirtieth of reduced sulfur emissions, in major part as a check on control efficiency. Since concern, at the NSPS emissions levels, for TRS, RS, and H_2S is the same (nuisance rather than health impact) the *de minimis* emissions rate for H_2S alone is set at ten tons per year.

Methyl Mercaptan, Dimethyl Sulfide, Dimethyl Disulfide, Carbon Disulfide, Carbonyl Sulfide—*De minimis* emissions rates were proposed for these compounds. However, none of them are individually regulated under the Act. Rather, they are described as constituents of either TRS or RS. Therefore, since *de minimis* emissions rates are promulgated for TRS and RS, individual *de minimis* for the five compounds have been dropped.

The complete list of the emissions levels promulgated today, and where applicable, the *de minimis* air quality design values from which they are derived, is given below in Table A:

Table A.—*De Minimis Values*

Pollutant	De Minimis emissions rate	Design air quality value (average time)
	(TPY)	($\mu g/m^3$)
Carbon monoxide	100	
Nitrogen oxides	40	2 (annual).
Sulfur dioxide	40	14.6 (24-hour).
Total suspended particulates.	25	10.4 (24-hour).
Ozone (volatile organic compounds).	40	
Lead	0.6	0.06 (3 month).
Asbestos	0.007	
Beryllium	0.0004	
Mercury	0.1	
Vinyl chloride	1.0	
Fluorides	3	
Sulfuric acid mist	7	
Total reduced sulfur (including H_2S).	10	
Reduced sulfur (including H_2S).	10	
Hydrogen sulfide	10	

The air quality design values are not included in the regulations. *De minimis* emissions levels are included for use in defining the term "significant." As in the proposal, these values determine the need to review modifications and determine which pollutants require BACT and air quality impact analyses for any new source or modification requiring review.

The Administrator does not believe that the promugated *de minimis* levels will produce an extraordinary administrative burden on reviewing authorities. Based on the data available, it is estimated that approximately 700 more sources will be subject to PSD review annually, all for small modifications not heretofore reviewed.

The regulations also include a list of air quality concentrations for each pollutant as criteria for exempting sources from the monitoring requirements at the discretion of the reviewing authority. Table B summarizes the applicable air quality values by pollutant type.

Table B.—*Monitoring Exemption*

Pollutant	Air quality value (averaging time)
	($\mu g/m^3$)
Carbon monoxide	575 (8-hour).
Nitrogen dioxide	14 (24-hour).
Sulfur dioxide	13 (24-hour).
Total suspended particulates	10 (24-hour).
Ozone	([1])
Lead	0.1 (24-hour).
Asbestos	([2])
Beryllium	0.0005 (24-hour).
Mercury	0.25 (24-hour).
Vinyl chloride	15 (24-hour).
Fluorides	0.25 (24-hour).
Sulfuric acid mist	([2])
Total reduced sulfur (including H_2S).	10 (1-hour).
Reduced sulfur (including H_2S)	10 (1-hour).
Hydrogen sulfide	0.023 (1-hour).

[1] All cases where emissions of VOC are less than 100 tons per year.

[2] No satisfactory monitoring technique available at this time.

Several Table B values are somewhat different from the design air quality numbers shown in Table A. This is because the Table B values are based on the current capability to provide a meaningful measurement of the pollutants. The values promulgated represent five times the lowest detectable concentration in ambient air that can be measured by the instruments available for monitoring each pollutant. The factor of five was chosen after reviewing test data for the various methods considered reasonably available. The decision was based in part on considerations of instrument sensitivity, potential for sampling error, problems with instrument variability (*e.g.*, zero drift) and the capability to read recorded data. For a more thorough discussion of this determination, see the memorandum from K. Rehme to W. Peters dated May 20, 1980, which is available in the rulemaking docket and from the address given for the other reports.

There also are several changes in the use of Table B from the Table 2 proposed on September 5. First, a source deemed subject to review may claim the *de minimis* air quality impact exemption from only the monitoring requirement for the reasons noted earlier. Next, under the proposal, a source had to demonstrate that its ambient impact would be *de minimis* to obtain an exemption from monitoring. As promulgated, the regulation allows a source to be exempted from the preapplication monitoring requirement if it shows either that existing air pollution in the source impact area or its projected impact in the affected area is *de minimis*. In most cases, little is to be gained from preconstruction monitoring in situations where either condition applies.

Finally, because there will be situations where monitoring will be necessary even if modeling predicts *de minimis* conditions, the exemption is not automatic but rather must be with the approval of the reviewing authority. For example, Table B values should not be used when (1) there is an apparent threat to an applicable PSD increment or NAAQS based on modeling alone or (2) when there is a question of adverse impact on a Class I area. Questions of adverse impact on a Class I area are to be decided on a case-by-case basis with the objectives of the affected Federal Land Manager in mind.

Some of the suggestions made in the comments have not been adopted. For the reasons stated earlier, many of the *de minimis* values have been increased. The automatic exemption on the basis of emissions rate is retained, although the exemption from monitoring has been made discretionary. The Administrator believes that a clear indication of applicability is necessary. It is not reasonable to expect a potential applicant to have continuous knowledge of the status of increment consumption and thus know when an application is required and when it is not. Nor have the *de minimis* values been promulgated as a guide only, with a screening review of all sources made mandatory as suggested by one commenter. The Administrator does not believe that there is a substantial programmatic benefit to be derived from such a stringent requirement.

Accumulation of *de minimis* values has not been dropped, because for most pollutants the promulgated *de minimis* emissions levels are now substantially higher than those proposed. The suggestion to allow sources with greater than *de minimis* emissions to make a showing that their air quality impact was *de minimis* and escape review was considered and then rejected. The higher emissions levels promulgated will offer much of the requested relief. Moreover, such an approach would not streamline the review process (*i.e.*, a detailed air quality analysis would still be necessary), and several sources with taller stacks might avoid review and the BACT requirement. Variations in actual impact because of stack height can be a factor in the BACT review. Similarly, an equation considering stack height to determine the *de minimis* emissions rate cutoff has not been promulgated. It is questionable whether such an equation could be developed for application nationwide that would be any less judgmental than the fixed *de minimis* emissions rates promulgated. Moreover, that approach would be little more than a case-by-case applicability assessment which the Administrator believes is inadvisable for reasons already described.

Other suggestions not accepted were to raise the *de minimis* emissions levels to 100/250 tons per year for the criteria pollutants, and to limit the *de minimis* concept to only the criteria pollutants. In developing an approach to defining *de minimis* for PSD purposes and consequently calculating the specific *de minimis* values under the guidance given within the Act and *Alabama Power*, emissions levels as high as 100 tons per year could not be justified for most criteria pollutants. Use of the *de minimis* concept with respect to only the criteria pollutants suggests that any increase (i.e., a zero *de minimis* value) would be significant for noncriteria pollutants and must be reviewed. As mentioned earlier, a zero *de minimis* is not practical for this program.

XII. Geographic and Pollutant Applicability

A. Background

Alabama Power held that in determining the applicability of PSD review, EPA must look to whether a source locates in an area to which Part C of the Act applies, rather than to the impact the source would have upon such an area. Accordingly, EPA proposed on September 5 to apply PSD review to a source if the source locates in an area designated attainment or unclassifiable for a pollutant which the source emits in major amounts. Each pollutant emitted by the source would be subject to PSD review, unless the pollutant was one for which an area is designated nonattainment and the source emitted that pollutant in major amounts. A modification to a source would be subject to PSD review under the September 5 proposal if it would result in a significant net increase in the emissions of any regulated pollutant for which the source is major and for which the area is designated attainment or unclassifiable. In addition, EPA proposed on September 5 to apply PSD review to a source or modification that would significantly affect an area in another state designated as attainment or unclassifiable for a pollutant for which the source or modification would be major. *See* 44 FR 5190–41, 51949 (§ 51.24(i)(2)), 5193–54 (§ 52.21(i)(8)).

On January 30, 1980, EPA stated that it intended not to apply PSD review based solely on interstate impact, because the court's final interpretation of the Act in *Alabama Power* suggested that PSD review was not appropriate in such circumstances. EPA also noted that under its September 5 proposal, a source or modification would be exempt from PSD review if it emitted in major amounts only pollutants for which an area had been designated nonattainment. EPA solicited comments on whether this exclusion should be retained, as well as on its proposal to delete PSD review based solely on interstate impacts. *See* 45 FR 6803 (January 30, 1980).

B. PSD Applicability

After further evaluation of its proposed approach, and consideration of the comments submitted in response to the September 5, 1979, and January 30, 1980, notices (see discussion below), EPA has decided to modify the September 5 proposal somewhat. Under today's action, except with respect to nonattainment pollutants, PSD review will apply to any source that emits any pollutant in major amounts, if the source would locate in an area designated attainment or unclassifiable for *any* criteria pollutant. If the source is subject to PSD review, then PSD review will be applied to each pollutant the source emits in greater than *de minimis* amounts, unless the area is designated as nonattainment under section 107(d)(1) for the particular pollutant. It should be noted that in order for PSD review to apply to a source, the source need not be major for a pollutant for which an area is designated attainment or unclassifiable; the source need only emit *any* pollutant in major amounts (i.e., the amounts specified in section 169(1) of the Act) and be located in an area designated attainment or unclassifiable for that or any other pollutant. Therefore, sources that are major only for pollutants for which an area is designated nonattainment will not be exempt from PSD review unless the source is located in an area which is designated nonattainment for all criteria pollutants or unless all of the regulated pollutants emitted by the source in greater than *de minimis* amounts are nonattainment pollutants.

The applicability of the PSD regulations to modifications mirrors that for new sources (*see* Modification). PSD review will apply to any modification to a source which emits any pollutant subject to regulation under the Act in major amounts, if the modification would result in a significant net increase in the emissions of *any* pollutant, and if the source is located in an area designated attainment or unclassifiable for any criteria pollutant. PSD review would not apply to any nonattainment pollutant. Unlike the approach proposed on September 5, in order for PSD review to apply, the modification need not increase emissions of a pollutant for which the source is major, nor need the source be major for a pollutant for which the area is designated attainment or unclassifiable.

EPA believes that this approach is required by *Alabama Power* and sections 165(a) and 169(1) of the Act. Section 165(a) states that "[n]o major emitting facility on which construction is commenced after the date of the enactment of [Part C of the Act], may be constructed in any area to which this part applies unless" the conditions set out in section 165(a) are met. *Alabama Power* held that this provision must be interpreted literally and that, in particular, EPA should focus on the *location* of the source, not its impact. *See* 13 ERC at 2012–2016. Today's action provides the necessary literal interpretation. A "major emitting facility" is defined in section 169(1) as a source which would emit at least 100 or 250 tons per year (tpy) (depending on the type of source) of "any" pollutant. This would cover both critiera pollutants, for which national ambient air quality standards have been promulgated, and non-criteria pollutants subject to regulation under the Act. Section 165 refers to an "area to which this part [part C] applies," which the Court in *Alabama Power* interpreted to mean "clean air areas," *i.e.* areas designated pursuant to section 107 as attainment or unclassifiable for a particular air pollutant 13 ERC at 2013. *See also* sections 161, 162, and 167 of the Clean Air Act. But neither section 165 nor section 169(1) links the pollutant for which the source is major and the pollutant for which an area is designated attainment or unclassifiable. Read literally, section 165(a) applies PSD preconstruction review to all sources that are major for any pollutant subject to regulation under the Act and locate in an area designated attainment or unclassified for any pollutant.

Section 165(a) also does not link review of a particular pollutant to the attainment status for that pollutant or limit review to pollutants for which a source is major. Rather, read literally, section 165(a) applies PSD review to *all* pollutants subject to regulation under the Act emitted by the source provided that the source is major for *some* pollutant and is located in a clean air area for some pollutant. However, implicit in *Alabama Power* and the structure of the Act is a recognition that where nonattainment pollutants are emitted in major amounts (i.e., where a source emits in major amounts a pollutant for which the area in which the source would locate is designated nonattainment), Part D NSR rather than Part C PSD review should apply to these pollutants (see below). PSD review does not apply to the nonattainment pollutants emitted by the source otherwise subject to review.

C. Nonattainment Applicability

On May 13, 1980, 45 FR 31307, EPA promulgated a final rule setting out the applicability of nonattainment review of new and modified sources. In brief, EPA clarified that the construction moratorium under section 110(a)(2)(I) and NSR under the Offset Ruling and section 173 apply to all major construction proposed in such areas. This applicability is unaffected by the particular air quality levels within the designated nonattainment area which would be caused or impacted by the proposed major source or major modification. States still are required under section 110(a)(2)(D) to review new or modified sources locating outside of nonattainment areas, but causing or contributing to a violation of an ambient air quality standard; however, review need not meet all of the nonattainment requirements under section 173 and the offset policy.

The current regulations concerning pollutant applicability in nonattainment areas have not been changed. These rules are different from the PSD pollutant applicability rules. Major sources are subject to review under the Offset Ruling, section 173, and the construction moratorium only if they emit in major amounts the pollutant(s) for which the area is designated nonattainment. In addition, only those nonattainment pollutants which the source emits in major amounts are subject to review or the construction moratorium. Similarly, only if a modification increases emissions of a pollutant for which the source is major and for which the area is designated nonattainment do nonattainment requirements apply. The basic rationale for these restrictions is that section 110(a)(2)(I), which contains the construction moratorium, restricts the construction moratorium to pollutants for which the source is major and for which the area is designated nonattainment. Since there is no requirement similar to the one in section 165(a) that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant, preconstruction review under the Offset Ruling and section 173 is restricted in the same manner as the construction moratorium.

For example, construction of a new plant with potential emissions of 500 tpy PM and 50 tpy SO_2 in an area designated nonattainment for both PM and SO_2 would be subject to nonattainment requirements for PM only, since the source is minor for SO_2. Similarly, modification of this plant resulting in a net increase in emissions of 50 tpy in SO_2 would not be subject to nonattainment requirements. See also examples (3), (4), and (7).

D. Case Examples

The following additional examples illustrate how applicability of PSD requirements will work under today's final regulations:

(1) Construction of a new plant with potential emissions of 500 tpy PM and 50 tpy SO_2 in an area designated attainment for both PM and SO_2 would be subject to PSD review for both PM and SO_2.

(2) Construction of the same plant as in example (1), but in an area designated attainment for SO_2 and nonattainment for PM, would be subject to PSD review

for SO_2 and nonattainment requirements for PM.

(3) Construction of the same plant as in example (1), but in an area designated attainment for PM and nonattainment for SO_2, would be subject to PSD review for PM only. PSD review would not apply for SO_2, since SO_2 is a nonattainment pollutant.

(4) Construction of the same plant as in example (1), but in an area designated nonattainment for both PM and SO_2 would be subject to no PSD review and to nonattainment requirements for PM. This would be the case even if the SO_2 emissions would have an impact on a nearby Class I area for SO_2 or on an area located in another state which is designated attainment or unclassifiable for PM.

(5) Modification to the plant in example (1), where the plant is located in an area designated attainment for both PM and SO_2 resulting in a 30 tpy net increase in PM emissions, would be subject to PSD review for PM.

(6) Modification to the plant in example (1), where the plant is located in an area designated attainment for SO_2 and nonattainment for PM, resulting in increased emissions of 50 tpy in SO_2, would be subject to PSD review for SO_2. (It is a significant increase at a major source located in an attainment area.) But if the modification only were to increase the emissions of PM by 30 tpy, only nonattainment requirements would apply, since this is a modification of a major source for a nonattainment pollutant.

(7) Modification to the plant in example (1), where the plant is located in an area designated attainment for PM and nonattainment for SO_2, resulting in increased emissions of 50 tpy SO_2, would be subject to neither PSD review, nor the nonattainment NSR requirements. Nonattainment NSR would not apply since the 50 tpy increase in the nonattainment pollutant does not occur at an existing major stationary source for that pollutant. PSD does not apply since the only change is to a nonattainment pollutant. Instead, the general NSR under the SIP would typically apply to this pollutant, and the new emissions of SO_2 would be accommodated in the SIP's allowance for area and minor source growth.

(8) Construction of a new plant with potential emissions of 500 tpy hydrogen sulfide (H_2S) in an area designated attainment for PM would be subject to PSD review for H_2S. If, in addition, the plant had potential emissions of 50 tpy PM, PSD review would be applied to both H_2S and PM.

(9) Construction of a new plant with potential emissions of 500 tpy CO and 50 tpy H_2S in an area designated nonattainment for CO and attainment for SO_2 would be subject to PSD review for H_2S and to nonattainment requirements for CO. If this plant were later modified, resulting in a net increase in emissions of 30 tpy in H_2S, PSD review would apply for H_2S.

(10) Construction of a new plant with potential emissions of 500 tpy H_2S in an area designated nonattainment for all criteria pollutants would not be subject to either PSD review or nonattainment requirements. Part D applies only to criteria pollutants, and the area here is not subject to Part C, since it is not designated attainment or unclassifiable for any criteria pollutant.

E. Interstate Pollution

The September 5 proposal, in response to the *per curiam Alabama Power* decision issued on June 18, 1979, would have required PSD review for a major source locating or modifying in a designated nonattainment area only if such construction would substantially impact a clean air area in another state. In its final opinion issued on December 14, 1979, the court reversed its earlier position regarding the need for a PSD review of all interstate impacts to a neighboring state's clean air area. Under both rulings, PSD review would apply in all cases where the construction would take place in a clean area. Pursuant to the court's revised ruling in *Alabama Power,* EPA will not apply PSD review to a pollutant emitted by a source locating in an area designated nonattainment for that pollutant, even where the source would impact a PSD area in another state. Sixteen of the nineteen comments received by EPA supported this decision. Three commenters requested EPA to propose regulations to control interstate pollution pursuant to sections 110(a)(2)(E) and 161. EPA is now evaluating how best to control interstate pollution, and may propose regulations some time in the future.

F. Geographic Applicability for VOC Sources

On September 5, EPA proposed to delete the "36 hour rule," which subjected a source of volatile organic compounds (VOC) to review, if the source proposed construction within 36 hours pollutant travel time of an ozone nonattainment area. Pollutant travel time was to be calculated using wind conditions associated with concentrations exceeding the ambient standard for ozone. Most commenters agreed with the proposal to delete this requirement. One commenter who disagreed focused on the need for the rule as a means of determining which sources locating outside a designated nonattainment area should be subject to nonattainment review. Another argued that without the rule EPA will end up unnecessarily reviewing sources in remote rural areas whose impact on the ozone nonattainmnent problem is insignificant, since ozone is a regional problem.

For the reasons expressed on September 5 (44 FR 51940), EPA has decided to delete the 36 hour rule. The commenters' concerns are taken care of by the rules on geographic applicability for nonattainment areas, as set out at 45 FR 31307 (May 13, 1980). Thus, all major VOC sources locating in a designated ozone nonattainment area will be subject to review under section 173. Major VOC sources locating outside a designated nonattainment area will be subject to PSD review and will be required to monitor for ozone. If the monitoring indicates that the area of source location is nonattainment, then the provisions of the Offset Ruling or State plans adopted pursuant to section 110(a)(2)(D) of the Act shall apply until the area is redesignated as nonattainment and a SIP revision has been approved. Of course, a source of VOC may choose to accept nonattainment review requirements immediately (i.e., LAER, offsets, statewide compliance of other sources under the same ownership) and conduct post-approval monitoring as presently permitted under the PSD regulations.

G. Response to Comments

Additional responses to comments regarding applicability of nonattainment requirements can be found at 45 FR 31307. Comments concerning interstate pollution and the geographic applicability of VOC sources, are responded to above.

With regard to PSD review, several commenters argued that EPA's approach would be overly complex and would impose great administrative burdens with few corresponding benefits to air quality. EPA does not agree. Applicability of PSD review as outlined above is required by the Act. Congress believed that such broad applicability was needed to adequately guard against significant deterioration in existing clean areas. EPA cannot restrict applicability and override Congressional intent simply because of an added administrative burden such applicability might impose. For similar reasons, EPA disagrees with the suggestion that it should restrict PSD review to only those pollutants that a source emits in major amounts.

Fourteen commenters argued that EPA should not apply PSD review to noncriteria pollutants, because the lack of NAAQS and increments for noncriteria pollutants indicates that Congress did not consider these pollutants to be able to cause significant deterioration and felt that the extent of harm by these pollutants has yet to be demonstrated. They claimed noncriteria pollutant sources are already subject to NSPS and NESHAP regulation. However, as other commenters have correctly noted, section 169(1) refers to sources with the potential to emit "any" pollutant above certain amounts. Moreover, section 165(a)(4) states that BACT must apply to "each polluant subject to regulation under this Act" emitted by a source. Neither of these provisions is limited to criteria pollutants. *See also Alabama Power*, 13 ERC at 2045.

Two commenters urged that if EPA decides to regulate sources with minor but significant emissions of criteria pollutants and sources of noncriteria pollutants, it should do so only if there already exists a SIP emission limit for the "minor" pollutants or only if section 111 or 112 (NSPS and NESHAP, respectively) has been made applicable after appropriate rulemaking to such sources of noncriteria pollutants. The difficulty with this approach is that the Act requires PSD review, regardless of whether another rule already applies to the source except in the case of nonattainment pollutants (see above). Moreover, the suggested approach could allow an unacceptably large number of sources to escape review, since many sources may not have an applicable SIP emissions limit or NSPS or NESHAP limit.

While most commenters endorsed the September 5 proposal that PSD permitting should be limited to instances where greater than *de minimis* changes in a major pollutant would occur, one commenter argued that *Alabama Power* did not restrict PSD applicability to modifications involving the pollutant(s) which the source emits in major amounts. This commenter claimed that section 111(a)(4) of the Act defines "modfication" as "*any* physical change in , or change in the method of operation of a stationary source which increases the amount of *any* air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." (Emphasis added.) As mentioned above in the Modification section, the Administrator agrees with this interpretation. Thus, today's final rule, with the exception of nonattainment pollutants, requires a PSD preconstruction review for greater than *de minimis* net increases in the potential to emit of a major stationary source for any pollutant subject to regulation under the Act.

Twenty-three commenters supported exempting nonattainment pollutants from PSD review. However, three commenters argued that PSD review should apply to nonattainment pollutants emitted in minor amounts, claiming that review in nonattainment areas should be as broad as that in PSD areas. EPA agrees with the former comments. As noted earlier, sections 165(a) and 169(1) apply to "any" pollutant regulated under the Act. The only restraint on PSD review, then, is section 173 in Part D, which governs the specific review of sources emitting nonattainment pollutant(s) in major amounts. In addition, sources emitting the nonattainment pollutants in minor amounts are subject to the general NSR contained in SIPs, and the impacts of such sources are accounted for in demonstrations of reasonable further progress and within the growth allowance provisions of the SIP. Thus, there is no need to apply PSD review to either type of nonattainment pollutant which already faces adequate review.

Twenty-three commenters also supported exempting from PSD review sources which emit only nonattainment pollutants in major amounts, but PSD pollutants in minor amounts, citing *Alabama Power* for support. Neither *Alabama Power* nor the Act support such an exemption. *Alabama Power* held that, at a minimum, PSD review does not apply to major sources which locate in an area designated nonattainment for all criteria pollutants. But the court did not take into account the fact that the same source may emit both PSD and nonattainment pollutants. Since, as noted above, section 165(a) does not link the pollutant for which the source is major and the pollutant for which an area is designated attainment or unclassifiable, EPA interprets section 165(a) as requiring PSD review for each source that is major for some pollutant and locates in an area designated attainment or unclassifiable for that or any other pollutant and that this review encompasses PSD pollutants whether or not emitted in major amounts.

Finally, some commenters perceived an inconsistency in requiring broader pollutant applicability for PSD review than for nonattainment review, yet using a broader definition of "source" for nonattainment areas than for PSD areas. However, EPA's actions are consistent with the Act. The scope of PSD review applicability and the nonattainment definition of source are separate issues and there is no basis for requiring that they be resolved in such a way as to in some manner equalize their effects.

XIII. Baseline Concentration, Baseline Area, and Baseline Date

EPA's June 1978 PSD regulations generally define baseline concentration as the ambient concentration level reflecting actual air quality as of August 7, 1977, including projected emissions of major sources commencing construction or modification before January 6, 1975, but not in operation by August 7, 1977, and excluding emissions from major sources commencing construction (including modification) after January 6, 1975. (40 CFR 51.24(b)(11), 52.21(b)(11) (1979).) Emissions from major source construction commencing after January 6, 1975, as well as most emissions increases occurring from existing sources after the baseline date are counted against the applicable PSD increments. (A more detailed discussion of the relationship between baseline concentration and increment consumption is provided in Increment Consumption.) Actual air quality includes emissions increases after the baseline date at existing sources whose emissions are counted in the baseline concentration, if the increases are due to increased hours of operation or capacity utilization authorized under the SIP and reasonably anticipated to occur on the baseline date. The baseline concentration also includes emissions increases allowed under a SIP relaxation pending final EPA approval on the baseline date, if the allowable emissions under the revision were higher than the source's actual emissions on the baseline date. The June 1978 regulations established a uniform baseline date of August 7, 1977 for all clean air areas. A definition of baseline area was unnecessary since all PSD areas were covered by the August 7, 1977 baseline date.

The *Alabama Power* decision held that a uniform baseline date was not authorized by section 169(4). It required the baseline date to be established at the time of the first application for a permit in an area subject to PSD requirements. EPA's regulations were consequently remanded for change.

The *Alabama Power* decision, however, supports EPA's definition of baseline concentration. In holding that monitoring data is required under section 165(e)(2), the court confirmed that actual air quality data should be used to determine baseline concentrations. *See* 13 ERC 2022. Since monitoring data provide information on actual air quality concentrations from existing sources and since section 169(4) explicitly states that required monitoring data should be used in establishing baseline concentrations, the court's decision supports EPA's requirement that baseline concentrations reflect actual air quality. In addition, the court implicitly affirmed EPA's approach in ruling that EPA correctly excluded from baseline concentrations emissions increases due to voluntary fuel switches after the baseline date. Since actual air quality on the baseline date would not reflect these increases, their exclusion from baseline concentrations is consistent with EPA's actual air quality approach to baseline concentrations. Finally, the court noted Congress' rejection of a House bill that would have allowed certain source emissions to be included in baseline concentrations, even though the emissions have not occurred by the baseline date. *See* 13 ERC 2026. The court concluded that Congress considered and rejected an approach that would depart from actual air quality in calculating baseline concentrations, except in the limited circumstances set forth in section 169(4).

In its September 5, 1979 response to the court's decision, EPA proposed to delete the uniform August 7, 1977 baseline date and to define baseline date as the date of the first complete application, after August 7, 1977, for a PSD permit to construct or modify a major stationary source in an area subject to PSD requirements. As part of that definition, EPA proposed to define baseline area as all parts of an Air Quality Control Region (AQCR) designated as attainment or unclassifiable under section 107(d) of the Act. Under that definition, an application of a major stationary source to construct in any part of an AQCR designated as attainment or unclassifiable would trigger the baseline date for both SO_2 and PM in all portions of the AQCR.

EPA's proposed definition of baseline area was based in part on its consistency with the term "area" as used in section 107, which requires air quality designations for AQCRs or portions thereof. The definition was also intended to avoid implementation problems that might result from having different baseline areas and dates within the same AQCR. EPA proposed, however, to allow states some flexibility in defining baseline area. *See* discussion at 44 FR 51942.

EPA further proposed to retain its current definition of baseline concentration but asked for comment on a particular problem specific to the Gulf Coast areas (*see* 44 FR 57107, October 4, 1979 and discussion in Increment Consumption). EPA's September 5 proposal specifically asked for comment on two aspects of its proposal: (1) whether baseline area should be defined as clean portions of the AQCR in which a source applies for a permit, and (2) whether a permit application should trigger the baseline date only in the clean portions of the AQCR in which the source would locate or also in clean areas of any AQCR which would be impacted by the source.

After issuance of the court's full opinion in December, EPA proposed and asked for comment on three changes to its September 5 proposal (45 FR 6802, January 30, 1980). First, EPA stated it was considering defining baseline area as any area designated attainment or unclassifiable under section 107(d) in which a source subject to PSD requirements would locate or impact, rather than all clean portions of an AQCR in which a source would locate or impact. Second, EPA's solicited comment on whether states should be allowed to redefine the boundaries of areas designated as attainment or unclassifiable. EPA suggested, however, that states should be limited to redesignations no smaller than the source's area of impact. Third, EPA indicated it was considering adoption of a pollutant-specific baseline date and area. Under that approach, a source would trigger the baseline only for the pollutants it emitted. Thus, if the source would emit neither SO_2 nor PM, it would not trigger any baseline. EPA also requested comment on whether a source which would be major for SO_2 and minor for PM would trigger a baseline date only for SO_2 or for both pollutants.

EPA's final action and response to comments on each of the issues is discussed below. For simplification, the discussion focuses on the four basic issues of baseline concentration, baseline area, baseline date, and pollutant-specific baseline. Issues related to increment consumption are discussed in the next section.

A. Baseline Concentration

As proposed, EPA is continuing its current definition of baseline concentration as the ambient concentration levels at the time of the first permit application in an area subject to PSD requirements. Baseline concentration generally includes actual source emissions from existing sources but excludes emissions from major sources commencing construction after January 6, 1975. Actual source emissions are generally estimated from source records and any other information reflecting actual source operation over the two-year time period preceding the baseline date. The baseline concentration also includes projected emissions from major sources commencing construction (including modification) before January 6, 1975, but not in operation by August 7, 1977.

Unlike the June 1978 policy, baseline concentration will no longer routinely include those emissions increases after the baseline date from sources contributing to the baseline concentration, which are due to increased hours of operation or capacity utilization. Existing policy permitted this grandfathering, provided such increases were allowed under the SIP and reasonably anticipated to occur as of the baseline date. Today's policy which normally excludes such increases is consistent with using actual source emissions to calculate baseline concentrations. An actual emissions policy, however, does allow air quality impacts due to production rate increases to sometimes be considered as part of the baseline concentration. If a source can demonstrate that its operation after the baseline date is more representative of normal source operation than its operation preceding the baseline date, the definition of actual emissions allows the reviewing authority to use the more representative period to calculate the source's actual emissions contribution to the baseline concentration. EPA thus believes that sufficient flexibility exists within the definition of actual emissions to allow any reasonably anticipated increases or decreases genuinely reflecting normal source operation to be included in the baseline concentration.

EPA is also promulgating a change in its current policy on SIP relaxations. Under that policy, emissions allowed under SIP relaxations pending on August 7, 1977 are included in the baseline concentration if the allowed source emissions were higher than actual source emissions. EPA adopted that policy in June 1978 in recognition of the fact that some states with SIP revisions pending on August 7, 1977 had allowed sources to increase emissions prior to final EPA approval of the relaxations, while other states with pending relaxations had required sources to comply with the lower emissions limitations in the existing SIP until final approval occurred. *See* 43 FR 26401 col. 3. To avoid penalizing sources in states that did not allow increases prior to approval, EPA provided that baseline concentrations include the allowable emissions under revised SIPs, if the relaxation was pending on August 7, 1977 and the allowed emissions exceeded the source's actual emissions.

The effect was to allow sources to avoid increment consumption analyses for the emissions increase allowed in the revision. EPA considered the exemption justified because states and sources were unaware that EPA would establish a uniform baseline date of August 7, 1977, and those emissions increases after that date would consume increment.

EPA believes this exemption from increment consumption analyses is no longer necessary. States and sources have been on notice since June 1978 that emissions increases at existing sources due to SIP relaxations must be evaluated for possible increment consumption. No state or source has been uncertain as to the applicable baseline date, or been placed in an inequitable position as to other states or sources. Therefore, today's regulations do not exempt from increment consumption analyses those SIP relaxations not finally approved by EPA prior to the baseline date in the affected area.

One commenter suggested that EPA extend the transition provision within the June 1978 regulations for assessing increment consumption. 43 FR 26401 col. 2. This provided that increased emissions from plan relaxations received after the August 7, 1977 baseline date but before the June 19, 1978 promulgation would consume the applicable increment but could be reviewed as part of the periodic assessment rather than assessed individually for increment consumption prior to plan approval.

EPA does not believe that a similar exception is required under today's regulations. EPA considered the exception necessary in June 1978 due to uncertainty as to how the 1977 Amendments would affect pending SIP relaxations. Such uncertainty no longer exists, since sources have been on notice since June 1978 that SIP relaxations after that date must be individually reviewed for increment consumption. Therefore, emissions increases due to plan relaxations received after June 19, 1978 must be individually evaluated for increment consumption prior to EPA approval.

EPA is concerned, however, that the new definition of baseline concentration may work a hardship on states with SIP relaxations pending when a PSD application is filed in an area. A state may submit a SIP relaxation affecting a source, or group of sources, located in an area where the baseline date has not been set, and would not be required to provide an increment consumption analysis. If prior to final EPA approval, a source filed a PSD application in the area, the application would establish a baseline date and the state would have to withdraw the revision until it has conducted the necessary increment analysis. To prevent such burdensome delays, EPA is exempting from individual increment analyses SIP relaxations pending at the time a baseline date is established in the area affected by the revision. However, increment consumption due to emissions from these relaxations must be evaluated as part of a state's periodic assessment. Exemptions from individual analyses is analogous to the previous relief provided for sources subject to SIP relaxations submitted after August 7, 1977, but before EPA's June 1978 promulgation. The exemption is therefore consistent with prior EPA policy.

B. Baseline Area.

In response to the September 5, 1979 proposal, fifty-three commenters felt that an AQCR definition of baseline area would not produce a great deal of administrative relief and would, simultaneously, limit an area's growth options. These commenters favored defining baseline area as the area of significant source impact, based on required modeling and monitoring analysis. Such an approach was claimed to provide just as much administrative relief, more growth options, and elimination of the problem of a small PSD source triggering the baseline date for a large area. Seventeen commenters favored a baseline area definition geared to areas designated as clean or unclassified under section 107. Those favoring this alternative strongly preferred a "redesignation" procedure to accompany this option. Other commenters objecting to the AQCR approach suggested: county boundary lines (three), and the entire state (one).

In response to EPA's January 30 notice, fourteen of sixteen commenters favored a source impact area definition of baseline area. One of the remaining two commenters favored retention of the AQCR approach while the other commenter desired a county or some other legal boundary approach. All eighteen comments received favored triggering a baseline only in the area in which a source would locate, and not in those other areas which it would impact. Nineteen of twenty-nine commenters favored permitting state redesignation but to areas no smaller than a source impact area. Seven other commenters favored no limitations on the redesignation procedure. The remaining three commenters opposed allowing states to redefine baseline areas through redesignation.

EPA has determined that baseline area should be defined as the area designated as attainment or unclassifiable under section 107(d) in which a source or modification subject to PSD review would construct or on which it would have an impact equal to or greater than $1 \mu g/m^3$ on an annual basis. EPA has concluded that "an area subject to this part," as used in section 169(4), refers to areas designated attainment or unclassifiable under section 107(d).

This view is strongly suggested by Judge Robinson's opinion on baseline concentration in the December 1979 *Alabama Power* ruling. Referring to Congress' intent to use actual air quality data to establish baseline concentrations, Judge Robinson states that "the task of monitoring existing ambient pollution levels *in attainment areas* is assigned to the first permit applicant, who will provide the information essential to calculation of the baseline." (Emphasis added) 13 ERC 1993, 2022. The footnote which follows that sentence discusses a state's obligation under section 107(d)(1) to submit area designations to EPA and the fact that section 107 lists submitted to date by the states indicate that many areas lack acceptable air quality information. *Id.* The references to attainment areas and section 107(d) designated areas indicate that the court interprets the statute as requiring that baseline concentrations be calculated for each clean area designated under section 107(d)(1).

EPA thus believes that neither the statute nor the court opinion support the proposed AQCR approach. The majority of comments also opposed defining baseline area as AQCR. Opposition was based on the view that it would do little to alleviate administrative problems, offered no flexibility in states, and would often limit an area's growth options by encompassing too large an area.

EPA has also determined that a PSD source should trigger the baseline in all intrastate clean areas that it impacts as well as the area it locates in. One objective of PSD is to track air quality changes in clean air areas. If a major source significantly affects any clean air area in the same state the purposes of PSD will be served if air quality deterioration from minor/area source growth and actual changes in baseline source emissions are tracked from the time significant SO_2 or PM emissions from a new or modified major source impact a clean area. Such a policy is also consistent with the language of section 165(e)(1) of the Act which requires an air quality analysis of the affected area, not just the area of immediate location. The Administrator does not believe that such a policy should transcend state boundaries. Since triggering baseline dates is an important factor in managing growth, EPA has concluded that states should have jurisdiction over their own baseline dates. On the other hand, establishment of baseline dates does not affect increment consumption across state borders by major source construction commencing after January 6, 1975.

EPA has concluded that baseline areas may be redefined by the states through area redesignations. Section 107(d) specifically authorizes states to submit redesignations to the Administrator. Consequently, states may submit redefinitions of the boundaries of attainment or unclassifiable areas at any time. If EPA agrees that the available data support the change, it will redefine the areas as requested. As long as no PSD source has located in, or significantly impacted on a clean area being considered for redesignation, the area can be redesignated as a new attainment or unclassifiable area, even if the area were previously part of a larger clean area in which the baseline date had been set.

Area redesignations are subject to certain restrictions. The boundaries of any area redesignated by a state cannot intersect the area of impact of any major stationary source or major modification that established or would have established a baseline date for the area proposed for redesignation or that is otherwise required to obtain a PSD permit. In addition, area redesignations can be no smaller than the area of impact of such sources. These restrictions comport with the PSD objective of tracking air quality effects in an area once a major source or modification has affected an area. By setting the baseline date at the time a major source or modification impacts an area and preventing the date from being changed by subsequent area redesignations, the system ensures that future growth in the area will be assessed for its air quality effects from that date forward. Moreover, if states could define baseline areas as small as the immediate area in which a source is located and not include the source impact area, air quality could deteriorate or increments could be violated in a nearby area impacted by the source, but neither the state nor EPA would review the air quality impact. The source could therefore affect air quality but the reviewing authority would be unaware of the deterioration. In addition to jeopardizing air quality, "postage stamp" baseline areas would be difficult to administer.

A source will be considered to impact an area if it has an impact of $1\ \mu g/m^3$ or more of SO_2 or PM on an annual basis. This figure has been selected because it corresponds to levels of significance used in previous Agency determinations for SO_2 and PM. The annual average was selected over the short term value due to its ease of implementation. That is, the shape of source impact areas is less complex and the $1\ \mu g/m^3$ annual average provides ample area coverage of the source impact area.

The Administrator believes that defining baseline area as section 107 areas and allowing state redesignation will satisfy most of the commenters who objected to the proposed AQCR definition and favored state flexibility in designations. The redesignation process partially meets the concerns of commenters who preferred defining baseline area as source impact area. Where a baseline date is established for an area that is large relative to the impact area of the triggering source, the state has the option of redefining the area to reflect more accurately the area affected by the source.

C. Baseline Date

Consistent with the Agency's proposal, today's promulgation defines baseline date as the date after August 7, 1977 on which the first complete application for a PSD permit is filed with the appropriate reviewing authority. Section 51.24(b)(14), 52.21(b)(14). As discussed in the September 5 notice, EPA has determined that this definition is mandated by the court's interpretation of section 169(4), which requires a baseline concentration to be set on the date, after August 7, 1977, "of the first application for a permit in an area subject to this part." *See* 44 FR 51941 col. 3. Consequently, the first complete PSD permit application by a major source to construct in a baseline area, as that term is defined in § 51.24(b)(15) and 52.21(b)(15), and explained above, will trigger a baseline date.

As discussed below, under *Pollutant-Specific Baseline,* the regulation further requires that a baseline date be set for each pollutant emitted by the applicant source in greater than *de minimis* amounts, if increments or other equivalent measures under section 166 have been established for the pollutant. At present, increments are established only for SO_2 and PM, and no increments or equivalent measures for other pollutants have been established.

Section 166 requires EPA to adopt regulations establishing increments or other equivalent measures for other criteria pollutants. Section 166 does not by its terms require EPA to apply section 169(4) in determining baseline dates for criteria pollutants other than SO_2 and PM. EPA is now conducting rulemaking under section 166 to develop increments or equivalent measures for the other criteria pollutants. As part of that rulemaking, EPA is considering how to establish baseline dates for those pollutants.

While comments supported EPA's proposal to establish the time of the first complete application in an area as the baseline date, eight commenters suggested that the date be set at the time of the first application after August 7, 1978, rather than August 7, 1977. This review is consistent with other comments noting that section 165(e)(2) requires permit applicants after August 7, 1978 to provide one year's monitoring or other equivalent air quality analysis to determine a baseline concentration for the area. These commenters claimed that since baseline concentration is to be established through actual ambient air quality data and no applicant can gather the necessary monitoring data before one year after the effective date of the part, the baseline date should not be triggered by applications filed before that date.

EPA understands the commenter's concerns. However, EPA believes Congress was aware that prior to August 7, 1978, applicants could not provide a full year of monitoring data, as evidenced by the fact that the monitoring requirement in section 165(e)(2) is not effective until August 7, 1978. Congress nonetheless provided that baseline concentrations be established by the first permit application, an event which could occur at any time after August 7, 1977. Congress therefore considered that baseline concentrations and increment consumption could be determined with less than a full year's monitoring data. The need to accept less data is reflected in the provision of section 169(4) that baseline concentrations be based on available air quality data and on such monitoring data as the applicant is required to submit. The provision suggests that calculations of baseline and increment use may have to be made with limited data, if available data, such as that from the state agencies, is not appropriate. EPA interprets the requirements for monitoring data after August 7, 1978, and not August 7, 1977, as intended to provide a grace period for sources, rather than evidencing intent to postpone the establishment of baseline dates.

One commenter questioned whether baseline dates would be triggered by permit applications previously filed by sources that were major under the June 1978 PSD regulations, but no longer major under the regulations promulgated today, even if the permit applicant failed to apply for a permit rescission. EPA concurs in the commenter's suggestion that a subsequent permit applicant in any area may inform the permitting authority that the baseline date was not triggered on the date that a source which no longer qualifies as major applied for a PSD permit. As the commenter points out, this eliminates the need for an immediate rescission of all past permits affecting sources no longer subject to PSD review. It also avoids penalizing permit applicants if a source that is no longer major fails to apply for a permit rescission.

The Administration wishes to clarify another point related to a change in review status for the source which has triggered the baseline date. If the applicant that established the baseline date is later denied a PSD permit or voluntarily withdraws its PSD application, a question arises as to whether the baseline date has been triggered. In the Administrator's judgment the applicable baseline date remains in place, since no change in date is authorized under the Act. Section 169(4) establishes source application as the baseline triggering mechanism and does not qualify this by the later issuance of a permit. This policy is consistent with the establishment of a baseline concentration which is based on the available monitoring data, typically that gathered by the source applicant. The data to establish the baseline concentration would be available regardless of the eventual permit status of the baseline triggering application. Using source application also stabilizes the NSR permitting process. Later applicants can determine whether a baseline date has been set in an area by looking to whether a previous application has been filed, rather than needing to determine if the permit has been or will be issued.

Finally, the Administrator wishes to point out that it is the first PSD application submitted under either 40 CFR 52.21 or state PSD regulations developed pursuant to 40 CFR 51.24 which triggers a baseline date. When states assume responsibility for implementing the PSD program, several PSD baseline dates may well have been triggered. However, as mentioned above, states can minimize the impact of early baseline dates by redesignating the size of the baseline area which is affected by a previously established baseline date.

D. Pollutant-Specific Baseline

The Agency has concluded that a pollutant-specific baseline is consistent with section 169(4) and the statutory structure. Section 169(4) requires that a baseline concentration be established "with respect to a pollutant * * * in an area subject to [Part C]." Therefore, by the terms of the statute, a baseline concentration is established for individual pollutants. Moreover, such concentrations are established for areas subject to PSD. Section 107(d), which provides that areas designated attainment or unclassifiable are subject to PSD, requires designations to be made on a pollutant-specific basis. Section 107(d)(1)(D) and (E). To be consistent, both baseline date and baseline area (and any subsequent redesignations under section 107 of the Act) must also be pollutant-specific.

The comments that favored a pollutant-specific baseline generally did so on two grounds: the reference to "pollutant" in section 169(4) and the statutory requirement to use monitoring data to establish baseline concentration. Since monitoring and increment consumption are pollutant-specific, baseline concentrations must be as well. The Administrator agrees that the monitoring requirement supports pollutant-specific baselines. Four of the thirty-eight commenters that opposed pollutant-specific baselines did so primarily for implementation reasons. Although pollutant-specific baselines may add some complexity to the PSD program, EPA has concluded that the statutory structure contemplates pollutant-specific area designations.

The following example illustrates the concept of pollutant-specific baseline dates. If a major source of NO_x that would also emit SO_2 in significant amounts and PM in less than significant amounts submits a complete application for a permit to construct in an area designated under section 107(d)(1) as attainment for all pollutants, and no previous source has triggered any baseline dates, the source would establish the baseline date for SO_2 but not PM. If a later modification to the source results in a significant net increase in PM emissions and no other application previously triggered the PM baseline date, the proposed PSD application for the modification would then establish the PM baseline date.

XIV. Increment Consumption

There are two basic issues in the area of increment consumption: (1) which source emissions consume increment and (2) how to calculate the amount of increment consumed by those emissions. The *Alabama Power* decision addressed neither question. EPA, therefore, proposed in September to continue its current approach. Under the approach, four categories of source emissions affect increment: (1) as provided by section 169(4), emissions from major source construction (including modification) commencing after January 6, 1975. This group includes emissions from sources issued PSD permits and state new source review (NSR) permits (including those issued in accordance with section 51.18(j) and the Offset Ruling) as well as emissions from non-permitted sources; (2) emissions changes occurring after the baseline date at sources whose previous emissions on the baseline date are included in the baseline concentration; (3) emissions changes due to SIP revisions that are approved after the baseline date; and (4) minor and area source growth occurring after the baseline date. EPA's current regulations provide that the first and third category of sources affect increment on the basis of emissions allowed under the permit and emissions allowed under the SIP as revised, respectively. The second and fourth categories affect increment on the basis of actual emissions changes from the emissions included in the baseline concentration.

Since its proposal, EPA has reevaluated its current policy in light of both the December opinion of the court and the Gulf Coast problem (discussed below). EPA has concluded that increment consumption and expansion should be based primarily on actual emissions increases and decreases, which can be presumed to be allowable emissions for sources subject to source-specific emissions limitations. This change principally affects increment calculations for major source construction not subject to source-specific permits or SIP requirements and for sources whose allowable limits are demonstrated not to reflect actual emissions. PSD applications pending today before EPA or a state agency authorized to review or issue PSD permits will be reviewed for increment consumption on the basis of the revised policy.

A. Use of Actual Emissions

1. Rationale for Use of Actual Emissions.

As discussed in the *Baseline Concentration* section, the *Alabama Power* decision supported EPA's requirements that baseline concentrations reflect actual air quality in an area. Increment consumption or expansion is directly related to baseline concentration. Any emissions not included in the baseline are counted against the increment. The complementary relationship between the concepts supports using the same approach for calculating emissions contributions to each. Since the *Alabama Power* decision and the statute both provide that actual air quality be used to determine baseline concentrations, but provide no guidance on increment consumption calculations, EPA has concluded that the most reasonable approach, consistent with the statute, is to use actual source emissions, to the extent possible, to calculate increment consumption or expansion.

EPA's decision is also based on concerns raised by the Gulf Coast problem, discussed below. In that area, and possibly others, source emissions allowed under permits and SIP provisions in many cases are higher than actual source emissions. Sources could therefore increase their emissions without being subject to PSD review or the SIP revision process. However, if increment calculations were based on allowable emissions, EPA believes increment violations would be inappropriately predicted and proposed source construction would be delayed or halted. In practice, EPA expects that few, if any, sources will increase their emissions to allowable levels.

EPA believes it is unwise to restrict source growth based only on emissions a source is permitted to emit but which, in many instances, have not been and are not likely to ever be emitted. Increment calculations based on the best prediction of actual emissions links PSD permitting more closely to actual air quality deterioration than calculations based on allowable "paper" emissions. In addition, use of actual emissions for increment consumption is consistent with using an actual emissions baseline for defining a major modification and for calculating emissions offset baselines.

2. Calculation of Increment Consumption Using Actual Emissions.

To determine how much increment remains available to a proposed major source or modification, the source owner or operator must analyze several types of emissions changes as of its application date. These changes generally include: (1) emissions changes that have occurred at baseline sources and emissions from new minor and area sources since the baseline date; (2) emissions that have occurred or will occur at sources which have submitted complete PSD applications as of thirty days prior to the date that the proposed source files its application; and (3) emissions changes reflected in SIP relaxations submitted after August 7, 1977, and pending as of thirty days prior to the date the source files its application, or emissions changes reflected in SIP relaxations which have been approved since August 7, 1977, but which have not yet occurred. (*See,* discussion below on calculation of increment consumption for SIP relaxations.) The thirty-day cutoffs are specified to stabilize the review process by preventing new applications and SIP relaxation proposals from invalidating otherwise adequate increment consumption analyses without warning.

Increment calculations will generally be based on actual emissions as reflected by normal source operation for a period of two years. EPA has selected two years based on its recent experience in reviewing state NSR programs for nonattainment areas. The state submittals use periods of between one and three years to evaluate source emissions. In EPA's judgment, two years represents a reasonable period for assessing actual source operation. Since the framework for nonattainment NSR programs will generally form the basis for a state's PSD plan, EPA believes it is appropriate to use the same time period for evaluating actual source emissions in the PSD program. Two years is also being used to calculate the emissions offset baseline for modifications in nonattainment areas.

The two-year period of concern should generally be the two years preceding the date as of which increment consumption is being calculated, provided that the two-year period is representative of normal source operation. The reviewing authority has discretion to use another two-year period, if the authority determines that some other period of time is more typical of normal source operation than the two years immediately preceding the date of concern. In general, actual emissions estimates will be derived from source records. Actual emissions may also be determined by source tests or other methods approved by the reviewing authority. Best engineering judgments may be used in the absence of acceptable test data.

EPA believes that, in calculating actual emissions, emissions allowed under federally enforceable source-specific requirements should be presumed to represent actual emission levels. Source-specific requirements include permits that specify operating conditions for an individual source, such as PSD permits, state NSR permits issued in accordance with § 51.18(j) and other § 51.18 programs, including Appendix S (the Offset Ruling), and SIP emissions limitations established for individual sources. The presumption that federally enforceable source-specific requirements correctly reflect actual operating conditions should be rejected by EPA or a state, if reliable evidence is available which shows that actual emissions differ from the level established in the SIP or the permit.

EPA believes two factors support the presumption that source-specific requirements represent actual source emissions. First, since the requirements are tailored to the design and operation of the source which are agreed on by the source and the reviewing authority, EPA believes it is generally appropriate to presume the source will operate and emit at the allowed levels. Second, the presumption maintains the integrity of the PSD and NSR systems and the SIP process. When EPA or a state devotes the resources necessary to develop source-specific emissions limitations, EPA believes it is reasonable to presume those limitations closely reflect actual source operation. EPA, states, and sources should then be able to rely on those emissions limitations when modeling increment consumption. In addition, the reviewing authority must at least initially rely on the allowed levels contained in source-specific permits for new or modified units, since these units are not yet operational at a normal level of operation. EPA, a state, or source remains free to rebut the presumption by demonstrating that the source-specific requirement is not representative of actual emissions. If this occurs, however, EPA would encourage states to revise the permits or the SIP to reflect actual source emissions. Such revisions will reduce uncertainty and complexity in the increment tracking system, since it will allow reviewing authorities and sources to rely on permits and SIP emissions limitations to model increment consumption.

Review of increment usage due to SIP relaxations will also be based initially on emissions allowed under the SIP as revised (provided this allowed level is higher than the source emissions contributing to the baseline concentration). Calculations will generally be made on the difference between the source emissions included in the baseline concentration and the emissions allowed under the revised SIP. Initial use of allowable emissions is necessary because the increment calculation generally occurs before the source has actually increased its emissions. Therefore, at the time the revision is reviewed, increment consumption must be based on the predicted source operation under the revision. In addition, since SIP revisions are commonly based on source requests, it is reasonable to assume such sources will actually emit at levels permitted by the relaxation.

Subsequent to the initial review process, increment calculations for SIP relaxations may depart from allowable emissions under the SIP, if the source has not actually increased its emissions. For example, three years after approval of a SIP relaxation, if it is found that the source has not increased its emissions to levels allowed in the SIP, estimates of increment usage should be revised to reflect actual source emissions. If this occurs, EPA would also encourage states to revise the emissions levels allowed in the SIP to represent the source's actual emissions.

Finally, the required increment consumption analysis can be amended by the applicant after the PSD review process has begun. For example, an applicant would normally revise its analysis to reflect increment made available by the withdrawal of PSD applications previously considered in the applicant's calculation of increment consumption. In no event, however, will the source be required to take account of emissions changes or changes due to pending PSD applications or SIP relaxations that could increase the amount of increment consumed by other sources.

B. Exclusions From Increment Consumption

1. *Exclusions Requested by Governors.*

Section 163(c) authorizes four exclusions from increment consumption upon the request of a governor. Exemptions are available for federally-ordered fuel switches under the Energy Supply and Environmental Coordination Act of 1974 or superseding legislation, fuel switches due to natural gas curtailment plans under the Federal Power Act, temporary emissions of particulate matter due to construction and related activities, and new sources constructing outside the United States. In the cases of the federally-ordered switches and natural gas curtailment plans, the exclusion is limited to a maximum of five years after the effective date of the order or plan.

The statute provides that these exclusions are available only if the state has an EPA-approved PSD plan. Section 163(c). In its June 1978 regulations, however, EPA permitted governors to use the exclusions during the nine-month period between promulgation of the regulations and the date plan revisions were required to be submitted. *See* § 52.21(f)(3) (1979). As discussed in the preamble to the June 1978 regulations, EPA concluded that prohibiting use of the exclusions after the nine-month period would be an adequate incentive to states to submit PSD plans. *See* 43 FR 26402 (Col. 1).

EPA has decided to extend this policy to today's regulations. In view of the many changes in the regulations resulting from the court's decision, states which have already submitted plans will have to submit revised provisions and states which have not yet submitted plans will have to develop plans based on the new regulations. As with the June 1978 requirements, EPA believes that disallowing the exclusions nine months from today will provide sufficient encouragement to states to submit plans, and will offer states more flexibility for growth in this interim period. Therefore, governors may request the exclusions until nine months from today's promulgation, even if no PSD plan has been submitted to or approved by EPA. Thereafter, the exclusions will be unavailable unless the state has submitted an approvable PSD plan to EPA.

2. *Temporary Emissions*

EPA's June 1978 regulations and the September 1979 proposal provided that temporary emissions from new sources or modifications would be exempt from impact analysis requirements §§ 51.24(k)(iii), 52.21(k)(iii) (1979); 51.24(k)(1), 52.21(k)(1) (proposed). Temporary emissions typically include, but are not limited to, emissions from a pilot plant, a portable facility, construction or exploration activities. Similarly, EPA proposed to exempt from increment analyses the impacts on the PSD increments from the temporary emissions associated with the development of an approved innovative control technology system, provided the applicable ambient standards were not jeopardized. The regulations, however, did not provide a comparable exemption for temporary emissions resulting from short-term SIP relaxations.

Only three commenters addressed the concern of temporary emissions and increment consumption. These commenters offered suggestions in light of the proposed position on innovative control systems. These commenters supported the existing policy of exempting temporary emissions from increment air quality analyses when no Class I areas or areas with known increment violations would be impacted.

Temporary SIP relaxations are comparable to temporary emissions from new and modified major stationary sources since both affect air quality for a limited period of time. Therefore, the Administrator has decided that the existing policy of exempting temporary emissions should be extended to those associated with certain SIP relaxations. A SIP relaxation will be eligible for such relief if it meets the following five conditions. These conditions are intended to ensure that the emissions increase associated with the SIP relaxation will be limited in duration and that no residual harm will occur to the environment as a result of the relaxation. (1) The SIP revision allows an emissions increase for a temporary period only. As stated in the preamble to the June 1978 regulations, temporary emissions generally would last no more than two years at one location, although emissions for a longer period of time may be considered temporary if an appropriate demonstration is made. *See* 43 FR 26394 col. 2. (2) The revision is nonrenewable. This condition is intended to prevent sources from indefinitely postponing compliance with emissions limitations necessary to prevent PSD increment violations. (3) The temporary emissions will not cause or contribute to the violation of any applicable NAAQS. (4) At the expiration of the temporary SIP relaxation, the source must be required to comply with an emissions limitation that ensures the post-exemption emissions will be equal to or less than the emissions existing before the exemption was granted. (5) The temporary emissions from the revision do not impact any Class I area and any area where an increment is known to be violated. Restricting the exemption to sources impacting Class II or III areas conforms to Congress' intent to provide maximum protection of air quality values in Class I areas and meets the commenter's concerns.

In addition to SIP relaxations for individual sources, the exemption will be available for temporary emissions due to SIP relaxations that apply to several sources, if the state provides adequate assurances that no standards will be violated.

C. Increment Expansion Due to Emissions Reductions Prior to the Baseline Date

EPA's policy under the June 1978 regulations is unclear as to whether emissions reductions prior to the baseline date increase the amount of available increments. The policy allows decreases after January 6, 1975, and prior to the baseline date, to be used by sources to offset subsequent increases and exempt the increases from the requirement for an ambient air quality assessment. In effect, EPA treats such decrease as expanding available increments, since the decreases permit later emissions increases at the same source to avoid the otherwise required air quality assessment. The policy did not state, however, whether isolated decreases not made in conjunction with intrasource increases were considered to expand available increments. In contrast, the policy is clear that emissions reductions after the baseline date increase available increments.

As a result of the revised definition of modification which permits offset credit for emissions reductions occurring within a moving five-year period, EPA has decided to clarify its existing policy. All emissions reductions prior to the baseline date at major stationary sources will now be considered to expand available increments. Since contemporaneous emissions reductions accomplished before the baseline date can be used by a source to offset a contemporaneous post-baseline emissions increase, and thereby avoid PSD review, it is also reasonable to allow these contemporaneous pre-baseline date reductions to expand the increment. Without this change, source owners that reduce emissions by retiring or controlling old equipment before the baseline date will be penalized by having increases after the baseline date count against increments even though the pre-baseline decrease might offset the later increase and eliminate the need for PSD review. In contrast, source owners that postpone the reductions and increases until after the baseline date is set would both secure contemporaneous offsets and avoid increment consumption.

EPA believes that this inequity should be eliminated to encourage early retirement of old equipment. Section 169(4) provides that emissions from major emitting facilities that commenced construction after January 6, 1975, shall be counted against available increments. The provision implies that both emissions increases and decreases should be considered for their impact on available increments. In view of the statutory language and policy considerations, EPA has determined that decreases made prior to a baseline date can expand available increments in the same manner as decreases made after a baseline date. However, to ensure that the emissions reductions remain effective, reductions will add to available increments only if the lower emissions limitations are federally enforceable.

The changed policy is reflected in a new definition of "construction" which is any physical change or change in the method of operation of a stationary source resulting in a change in the actual emissions of the source (including fabrication, erection, installation, demolition, or modification). Any construction commencing at a major source since January 6, 1975, may result in an increase or decrease in actual source emissions. If an actual decrease involving construction at a major stationary source occurs before the baseline date, the reduction will expand the available increment if it is included in a federally enforceable permit or SIP provision. An actual increase associated with construction activities at a major stationary source will consume increment.

The Administrator would also like to clarify that changes in fugitive emissions levels (to the extent quantifiable) at major stationary sources, resulting from construction commenced since January 6, 1975, will consume or expand the available increment. This is true even if such changes occurred prior to the baseline date.

D. Gulf Coast Problem.

In the September 5 proposal, and in an October 4, 1979 correction notice, EPA solicited comments on how to calculate increment consumption by gas-fired boilers in the Gulf Coast area that had received state approval to burn oil in the event of a future natural gas shortage. *See* 44 FR 51942 (September 5, 1979), and 44 FR 57107 (October 4, 1979). The affected units include both boilers that could accommodate such a fuel-switch before January 6, 1975 and boilers that were altered to accommodate the fuel-switch after that date. All affected units were permitted to switch fuel before August 7, 1977, the earliest possible baseline date. Assuming the baseline date is set in the area where these sources are located, which EPA believes is the case for most of the sources, each group of sources may cause increment violations.

For sources that could burn alternative fuels prior to January 6, 1975, the problem is posed by the fact that if all sources made the switch to oil allowed under their permits, SO$_2$ increment violations would occur. Since neither a SIP revision nor a PSD Permit would be required for the sources to make the fuel switches, EPA and the state could be unaware of the violations until another source applied for a PSD permit or until a periodic assessment was made. If actual increment violations were discovered during the PSD review process for the proposed source, the source would not be permitted to build or modify until the violations were corrected. If violations were found during a periodic assessment, the state would have to suspend further growth until its plan was revised to correct the violations. Consquently, the inadequacy of the exiting permits to prevent increment violations could result in increment violations which would delay, and possibly prevent, additional growth in the area.

A similar problem is posed by sources that could not accommodate oil before January 6, 1975. Since these sources increased their potential to emit after January 6, 1975, under EPA's June 1978 policy, this change would have constituted "construction" at a major stationary source after January 6, 1975. Therefore, under section 169(4), any emissions increases caused by the "construction" would have consumed increment. As noted above, EPA's June 1978 policy required increment calculations to be based on emissions allowed under a permit or SIP and not on actual source emissions. If a PSD source applied to locate in an area and these Gulf Coast sources were modeled based on emissions increases due to fuel switches allowed by their permits, EPA believes several SO$_2$ increment violations would be predicted. Under existing policy, the proposed PSD source would then be required to correct the violations prior to receiving construction approval. Future growth in the area could, therefore, be delayed or prevented.

The problem posed by the second group of sources is reduced to some extent by the increment consumption policy promulgated today. Since increment usage will now be based on changes in actual source emissions, increment violations will not occur in the area unless the sources actually switch to oil from natural gas. Because natural gas is expected to remain less expensive and more available than oil, EPA believes few, if any, switches are likely. Therefore, while the increments may still be jeopardized due to inadequate permit conditions, PSD review can proceed as long as actual emissions increases at existing sources and actual emissions from sources with PSD or NSR permits are not predicted to cause increment violations.

If an actual increment violation has occurred, EPA's June 1978 policy imposes a PSD permit moratorium until the violation is corrected. 43 FR 26401 (col. 1), June 19, 1978. This policy is continued in today's regulations. Therefore, if an increment violation is predicted to occur within the significant impact area of a proposed source (1 $\mu g/m^3$ on an annual average), a PSD permit cannot be issued to the source, unless the state or source obtains sufficient emissions reductions to restore the increment. The issue of how to deal with potential increment violations due to inadequate permit conditions is addressed in the next discussion.

Several comments were received in response to EPA's request for comments on the Gulf Coast problem. Although EPA believes its revised policy of using actual emissions to calculate increment consumption resolves the immediate Gulf Coast dilemma, and similar potential problems in other states, EPA is responding below to suggestions made by commenters.

EPA's notices questioned whether the Agency should or may include in the baseline concentration emissions increases due to fuel switches. Twelve of thirteen commenters on the issue supported including increases due to fuel switches in the baseline concentration and the majority of the commenters favored including in the baseline concentration other emissions increases approved prior to the baseline date but not occurring by that date. Commenters also proposed using allowable emissions in all cases to calculate baseline concentrations.

As discussed above and in Baseline Concentration, EPA has determined that both baseline concentrations and increment consumption should be based on actual air quality impacts. This decision is consistent with the suggestion of some commenters that EPA consider increment consumption to occur only when actual emissions increase and not when the permit or SIP allowing the increase is approved. As a result of EPA's revised policy, emissions increases due to fuel switches cannot be included in the baseline concentration unless the increase occurred prior to the baseline date and at a source which could accommodate this switch prior to January 6, 1975 without physical change or received approval under a PSD permit to make the switch.

One commenter was particularly concerned that unless allowable emissions were included in the baseline concentration, utilities with SIP relaxations approved shortly before the baseline date would be penalized if the utilities were unable to make the allowed increase by the baseline date. The commenter argued that some utilities would be unable to make the technical changes necessary to accommodate the fuel switch prior to the baseline date. Such utilities would, therefore, be required to do an increment consumption analysis, in contrast to other sources that made the switch before the baseline date. The commenter suggested that accounting for the allowed emissions increase in the baseline concentration would resolve this inequity and would be consistent with EPA's June 1978 policy of including in the baseline concentration emissions allowed under SIP relaxations pending before EPA on the baseline date.

While appreciating the commenter's concerns, EPA has concluded that no exemption from increment consumption analyses is appropriate in these cases. First, as discussed in Baseline Concentration, EPA has changed its June 1978 policy to provide that increment is consumed by emissions increases due to SIP relaxations pending EPA approval on the baseline date. Therefore, the exemption cited by the commenter no longer applies. Second, the June 1978 exemption was provided for sources whose emissions increases were delayed by the administrative process and not by physical limitations at the source. Therefore, the June 1978 exemption would not have applied to these utilities. Third, under the regulations promulgated today, if significant construction is necessary to make the allowed emissions increase, the change is a modification and would be subject to PSD review, including increment consumption analysis, in any case.

Other commenters suggested that prospective application of the definitions of major emitting facility and modification promulgated today would resolve the Gulf Coast problem. Under this approach, emissions increases that occurred after January 6, 1975, and would otherwise be considered modifications that consume increment under today's regulations, would not be evaluated under the new definitions. These commenters argued that the Gulf Coast problem is due to increment consumption from emissions increases not subject to the PSD permitting process at the time the increases were approved. The commenters stated that EPA has flexibility in deciding the effective date of the definitions.

EPA believes that section 169(4) requires emissions from all major emitting facilities (as defined in the Act and not as defined in the old PSD regulations) commencing construction after January 6, 1975 to count against increment. The statute provides no discretion to exempt these emissions from increment consumption. EPA also notes that under the PSD regulations effective from January 6, 1975 to August 7, 1977, emissions increases at such sources would have consumed increment to the extent the fuel switches occurred. (*See* 39 FR 42510).

E. Potential Increment Violations

1. Inadequate SIP and Permit Provisions. While the use of actual emissions to calculate increment consumption partially resolves the Gulf Coast problem, the potential for increment violations remains, due to inadequate SIP and permit provisions. As stated in the preceding discussion, many sources in the Gulf Coast area, and in other states as well, have permits or SIP requirements that allow actual emissions increases without subjecting the source to PSD review or the SIP revision process. For example, sources may be allowed to burn fuels with higher sulfur contents, as in the Gulf Coast area, or may have high allowable limits that would permit sources to relax existing pollution controls. If all sources in an area increased actual emissions to levels allowed under the SIP or permits, EPA believes increment violations would occur. Because no PSD review or SIP revision would be required, neither the state nor EPA would know of the violations until a PSD application was filed or a periodic assessment occurred. Growth would be halted until the violation was corrected.

At present, increment violations due to allowed but unreviewed emissions increases, and consequent construction delays, are only potential problems. EPA has therefore concluded that it is premature to promulgate remedial regulations to prevent such theoretical violations. EPA, however, encourages states to be alert to emissions increases that affect the increment. EPA urges states to closely monitor emissions increases from baseline sources and from new or modified sources not subject to PSD review which affect the available increment. States should consider requiring sources to report any emissions increases after the baseline date, including increases reflecting changed operating conditions that will continue for an extended period of time, perhaps six months. States would then learn of increases that consume increments and could take those increases into account in PSD permit reviews and periodic increment assessments. In addition, states are encouraged to revise SIPs and/or issue operating permits so that SIP requirements and permits reflect actual source operating conditions. This will protect against large unreviewed emissions increases. While EPA is not promulgating a reporting requirement today, it will reconsider the need for a notification system if it finds that unreviewed emissions increases are causing or contributing to increment violations.

2. Double Counting of Emissions Decreases.

EPA is concerned about another potential problem: double counting of emissions decreases. The problem could arise if an existing source (Source A) reduces its actual emissions and a new source (Source B) seeking to locate in the area proposes to use the decrease when modeling increment consumption. Source B would do this by including the emissions decrease in its modeling of actual emissions from Source A. If the reviewing authority does not require Source B to ensure that the decrease at Source A is federally enforceable and does not record Source B's use of the decrease at the time Source B conducts its modeling, Source A may well use the same decrease to offset a future contemporaneous increase at Source A and thereby avoid PSD review for the increase. The use of one emissions decrease to offset two emissions increases could lead to air quality deterioration, and possible increment violations that would require correction before more PSD permits could be issued.

While EPA believes double counting of decreases should not be permitted, it is not promulgating regulations today to address the problem. EPA is uncertain how often, if ever, the problem will arise. Certainly it will be difficult for a new source to prove to the satisfaction of the reviewing authority the value of an emissions decrease accomplished at another source. Moreover, while EPA believes double counting of decreases should not occur, it is uncertain what solution is equitable for affected sources. In the absence of a formal increment banking system, or other provisions regulating increment allocation, the reviewing authority would have no basis for denying Source B use of any available increment. This could result in hardship to Source A if it deprives Source A of use of its decrease as an offset for future increases.

The issue of double counting is part of the broader question of increment management and allocation of air quality rights. EPA intends to develop banking regulations, which will include guidance to states on methods of increment allocation and regulating use of emissions decreases. To this end, EPA solicits suggestions on how to prevent double counting of decreases and on methods of increment allocation and management.

XV. Best Available Control Technology

Section 165 of the Act provides in part that any "major emitting facility" constructed in a PSD area must apply best available control technology (BACT) "for each pollutant subject to regulation under this Act emitted from, or which results from, such facility." Section 169(3) of the Act defines BACT and specifically requires that it not be applied in a manner so as to result in emissions in excess of those that are allowed by standards established pursuant to sections 111 or 112 of the Act. 42 U.S.C. 7479(3). The Agency's existing regulations required BACT only for each pollutant for which a source or modification would be "major." 40 CFR 51.24(i)(1), 52.21(i)(1)(1978).

The *Alabama Power* decision held that the Act requires that BACT be applied to all pollutants subject to regulation under the Act, not only those for which the source is major, and that EPA is without authority to circumscribe the requirement in this manner. 13 ERC 1993, 2046. The court did conclude, however, that EPA has authority to set *de minimis* thresholds for BACT applicability, in order to alleviate economic and administrative burdens. *Id.*

In response to the court's decision, EPA proposed and is now promulgating regulations regarding application of BACT. 40 CFR 51.24(k)(1), 52.21(k)(1). With respect to new major stationary sources, BACT will be required for each regulated pollutant emitted in excess of specified *de minimis* amounts. Application of BACT is also required, in the case of major modifications, for each regulated pollutant emitted for which there is a significant net emission increase (greater than *de minimis* amounts) at the source. The BACT requirement applies to only the modified units and added units at the source whose construction results in a source-wide significant net increase in the emissions of the regulated pollutant. The new BACT requirements apply only to the owner or operator of a PSD source or modification whose application for a PSD permit was not complete before today's promulgation. (*See* Transition).

The *de minimis* emissions rates promulgated by the Administrator (*see De Minimis* Exemption) will apply to both BACT and LAER requirements. The Agency specifically solicited comments on the need to specify *de minimis* levels for BACT, since the case-by-case BACT determinations would presumably take *de minimis* levels and such related issues as cost into account. Twenty-six commenters addressed this issue. Seventeen agreed in principle but generally considered the proposed levels too low and requested special consideration for pollutants emitted in less than major amounts. Eight of nine dissenters preferred case-by-case BACT determinations, with no *de minimis* values.

The Administrator is implementing the proposed *de minimis* approach for determining BACT applicability, although several values have been increased. (*See De Minimis* Exemptions.) This action should alleviate the concerns of those commenting about the need for BACT review of those pollutants emitted in small amounts. The Agency also solicited comments on the potential problem of a source obtaining lenient BACT determinations and later applying better controls to offset additional expansion plans. Twelve of thirteen commenters addressing this issue concluded that no such problem would arise. They claimed that it would be implausible to suppose that state programs and EPA regional offices would evade such responsibility, especially since loose BACT determinations would result in accelerated consumption of increment. The Administrator agrees that there appears to be adequate protection against loose BACT determinations.

Each of the three comments that addressed a need to phase in the BACT requirement favored a six month to one year grace period because of the complexity of the program. However, the Administrator believes that the case-by-case flexibility of BACT determinations is sufficient to phase in these regulations. Moreover, sources have effectively had a one year notice, in that the original *Alabama Power* decision, published June 18, 1979, informed them of the new BACT requirements. (*See* Transition.)

An additional issue, regarding the pollutant applicability of the BACT requirement, arose during the comment period. The proposal required BACT for the new or modified emissions units which were associated with the modification and not for those unchanged emissions units at the same source. Thus, if an existing boiler at a source were modified or a new boiler added in such a way as to significantly increase particulate emissions, only that boiler would be subject to BACT, not the other emissions units at the source. However, the proposal could be interpreted as requiring BACT for certain pollutants where the

Administrator did not intend to require BACT. For example, the proposal could be interpreted as requiring BACT review for any pollutant emitted from a source that was modified, regardless of whether the emissions of the pollutant increased. However, that was not the Agency's intent.

If a new unit were added or if a modification were made to a unit at a source, but there are contemporaneous decreases in emissions elsewhere at the source, BACT is required only for the pollutants for which there is a net significant plant-wide increase. For example, consider the addition of a boiler whose emissions of PM, SO_x, and NO_x each exceed *de minimis* levels. If, at the same time, an emission unit of SO_x elsewhere at the source were shut down, such that plant-wide emissions of SO_x either do not increase or increase by less than a *de minimis* amount, BACT is required for the new boiler only for PM and NO_x. Of course, BACT will not be required if there is no significant plant-wide increase in emissions of any pollutant. Similarly, if an existing emissions unit of a source were modified such that there is an emissions increase for one or more pollutants, but not all, BACT is required only for the pollutants for which there is both a net increase at the unit and a net significant plant-wide increase.

The above final policy governing the applicability of BACT to modifications is also consistent with existing policy under section 111, which the court said should govern modification concerns. The applicable regulation, 40 CFR 60.14(a), states that "any physical or operational change to an existing facility which results in an increase in the emissions rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility *for each pollutant to which a standard applies and for which there is an increase in the emissions rate* to the atmosphere." (Emphasis added.)

The regulation cited above makes two important statements about the applicability requirements. First, the BACT requirements apply only with regard to those pollutants for which there has been a net significant increase. This was emphasized by the Alabama Power decision: "Congress wished to apply the permit process, then only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase * * *. The interpretation of 'modification' as requiring a net increase is thus consistent with the purpose of the Act * * *. The EPA has properly exempted from best available control technology (BACT) and ambient air quality review those 'modifications' of a source that do not produce a net increase in any pollutant." 13 ERC at 2043.

Second, BACT is required for net significant increases of *any* pollutant regulated under the Act, regardless of the category of source involved or the emissions standards generally applicable to it. Section 165(a)(4) of the Act requires application of BACT "for each pollutant subject to regulation under this Act" emitted from a subject facility. 42 U.S.C. 7475(a)(4). This includes not only criteria pollutants but also all pollutants regulated under NSPS or NESHAP. In this manner, BACT can complement the NSPS process by extending coverage to additional source types and units and perhaps identifying candidates for future NSPS and NESHAP regulations.

XVI. Monitoring

In *Alabama Power*, the court held that section 165(e)(1) of the Act requires an ambient air quality analysis for each pollutant subject to regulation under the Act that a proposed source or modification would emit, prior to applying for a PSD permit. Since existing PSD regulations require monitoring only for criteria pollutants emitted in major amounts, EPA responded to the June 18, 1979 *per curiam* opinion by proposing to require, for criteria and noncriteria pollutants, an air quality analysis that would generally include monitoring data. In order to gather and analyze the appropriate data necessary to apply for a PSD permit, a proposed source would have to establish an appropriate monitoring network or would have to gather and analyze representative air monitoring data resulting from ongoing monitoring activities.

As proposed, preconstruction monitoring data was required as part of the air quality analysis when: (1) the estimated ambient impact of any new pollutant emissions from the stationary source or modification would be larger than the pollutant specific *de minimis* air quality concentration (Table B); or (2) the new emissions or net emissions increases for the pollutant would be major (100/250 tons per year). In addition to this rule, EPA proposed that a case-by-case analysis of the proposed stationary source or modification which would impact on a Class I area be conducted even though the anticipated impact would fall below the *de minimis* level. Later, in October 1979, EPA provided further guidance for applying these requirements in the draft revision of the *Ambient Monitoring Guidelines for Prevention of Significant Deterioration (PSD)*, OAQPS 1.2–096, U.S. EPA, Office of Air Quality Planning and Standards and Office of Research and Development, RTP, NC 27711.

The proposal stated that certain noncriteria pollutants (sulfuric acid mist, carbon disulfide, carbonyl sulfide, methyl mercaptan, dimethyl disulfide, and dimethyl sulfide) were lacking measurement methods approved by EPA. Until such time as approved techniques would become available, the Agency proposed to use mathematical modeling to estimate the air quality resulting from the emissions of these pollutants. Considering these limitations and the general lack of experience in monitoring on a routine basis, the Administrator proposed to implement noncriteria pollutant monitoring requirements on a case-by-case basis.

In addition to the pre-application monitoring requirements already described, EPA's proposal included discretionary authority for requiring post-construction monitoring to determine the effects of the new emissions on existing air quality. For cases in which larger pollutant emission impacts are anticipated, post-construction monitoring can be a particularly useful aid in adjusting modeling results used to predict concentrations resulting from the source's operation. The approach was thought to be responsive to the *Alabama Power* decision which required EPA to use monitors to help refine modeling techniques. Accordingly, EPA proposed to generally require post-construction monitoring from large sources of particulate matter and sulfur dioxide. Other sources whose emissions are estimated to result in air quality levels approaching an allowable increment or a NAAQS could also be required to submit post-construction monitoring data. The rule promulgated today is consistent with the proposal.

The Administrator believed that the required monitoring data would be most productive in checking the accuracy of models and, in some cases, could be used to calculate increment consumption. If an applicant or other party believes that a model required by EPA had either overpredicted or underpredicted the air quality impact of a source, EPA stated that monitoring data would be evaluated to the extent possible to determine whether adjustments would be necessary. EPA anticipated that the future development of more sophisticated monitoring techniques may permit increased use of monitoring data to track increment consumption and establish ambient baselines, as well as improve the level of confidence in modeling.

Lastly, EPA considered the approach needed to smoothly usher in the new monitoring requirements. The September 5 Federal Register indicated that EPA intended to require any additional monitoring requirements, as now necessary under *Alabama Power*, to be phased in. Later, in October 1979, the draft ambient monitoring guidelines specified that a three-month allowance would be subtracted from the time interval over which the owner must monitor to allow for procuring and setting up the necessary monitoring equipment. (*See* Transition).

There was a large response to EPA's proposal and draft monitoring guidelines—nearly 100 public comments and over 800 requests for the guidance document were received. The comments indicated general agreement with EPA's interpretation of the court's preliminary opinion. But some concern was expressed over certain specific portions of the proposal: (1) the limited technology available to monitor the noncriteria pollutants in the ambient air; (2) the large cost associated with gathering all the required air quality data for all regulated pollutants; (3) the identification process for "representative" data; and (4) the need for post-construction monitoring.

Subsequent to the publication of the September 5, 1979 proposal and the receipt of the public comment, the court issued its final decision on December 14, 1979. One important change the court made upon reconsideration of the June 18 opinion was "that section 165(e)(1) requires that *an analysis* be conducted, and that it be conducted for each pollutant regulated under the Act. But * * * that section 165(e)(1), standing alone does not require monitoring as *the* method of analysis to be employed in the fulfillment of its requirements." 13 ERC 1993, 2019. This ruling gave EPA more flexibility in defining the minimum requirements for a proper analysis of the noncriteria pollutants. "EPA might * * * choose *either* monitoring or modeling as the method of analysis * * *" *Id.* In other monitoring issues the court essentially affirmed its preliminary opinions.

Today, the Administrator is promulgating the proposed monitoring requirements with the noted exceptions. (*See* 40 CFR 51.24(m), 52.21(m)). EPA will generally require one year's worth of monitoring data as part of the air quality analysis for only the criteria pollutants. For the noncriteria and hazardous pollutants, modeling, not monitoring, will be the mechanism used to perform most detailed air quality analyses. However, there may be certain circumstances where monitoring may be the only option available to perform an adequate analysis for the noncriteria pollutants (e.g., when little or no data on emission inventories for the area of concern exist). In that case, EPA will require ambient monitoring for the noncriteria pollutants if there is an acceptable method for the monitoring of that pollutant. Presently, the Administrator has acceptable methods for measuring ambient concentrations of: (1) all the criteria pollutants; (2) mercury; (3) beryllium; (4) vinyl chloride; (5) fluorides; and (6) hydrogen sulfide. A list of acceptable methods and copies of the method description are available by writing to: U.S. EPA, Environmental Monitoring Systems Laboratory, Quality Assurance Division (MD-77), Research Triangle Park, N.C. 27711. Also, techniques to measure ambient total reduced sulfur and reduced sulfur compounds have been chosen and will be added to the list within the next several months. At this time there are no acceptable methods for measuring ambient levels of asbestos and sulfuric acid mist.

As EPA gains more experience from the PSD program with respect to noncriteria pollutant analysis and as the technology develops, the Administrator will consider an increased role for ambient monitoring within the required air quality analysis.

In addition to the exemptions given in the *de minimis* section of this Federal Register publication, EPA may not always require a source owner to establish a monitoring network when the data would not validate or improve the estimates made by the mathematical models. When the existing air pollution levels are conservatively estimated to be quite small and a monitoring network could not reliably measure the predicted background concentrations, EPA will generally not require the source owner to generate preconstruction monitoring data. Also, if the source owner has submitted preconstruction data for the source site, and the post-construction monitoring network could not measure a predicted degradation in the air quality, then EPA will generally not require the source owner to collect further monitoring data. More guidance for meeting all the monitoring requirements is given in the *Ambient Monitoring Guidelines for Prevention of Significant Deterioration* (PSD), EPA-450/4-80-012, July 1980, available from the Monitoring and Data Analysis Division, OAQPS, (MD-14), U.S. EPA, Research Triangle Park, N.C. 27711.

In the September 5, 1979 proposed regulations and the October 1979 draft of *Ambient Monitoring Guidelines for Prevention of Significant Deterioration* (PSD), EPA solicited comments on the use of representative air quality data to satisfy PSD monitoring requirements. Thirty-nine comments were received on the various aspects of the use of representative air quality data. The major responses were as follows: twenty-four commenters supported the use of existing representative air quality data, especially for remote areas. Five commenters wanted EPA to allow the use of bubbler data in lieu of continuous monitoring data, seven respondents believed that data older than two years should be allowed, and three objected to the quality assurance requirements for the representative data.

EPA has considered all of the comments and has taken the following actions:

(1) The use of existing representative air quality data will be permitted in lieu of monitoring, provided that the data meet the criteria in the above reference guideline.

(2) No bubbler data will be permitted because the data should be of the same quality as that obtained if the applicant monitored according to the requirements in the above referenced guideline. This guideline specifies monitoring must be done with continuous instruments to eliminate measurement biases associated with bubbler data. Continuous measurements are also more suitable for routine monitoring purposes in checking for compliance with short-term standards.

(3) EPA will allow the use of data, for preconstruction purposes only, collected in the three-year period preceding the permit application provided reference/equivalent quality assurance procedures were followed during the measurement period. The draft guideline has previously specified a two-year requirement.

(4) EPA reaffirms the intent that all monitoring data collected must have been collected in accordance with acceptable quality assurance procedures. The specifics of the minimum quality assurance program needed for collecting air quality data are contained in the referenced guideline.

Finally, the court held that EPA had failed to provide concrete guidance to the states for designating when less than one year of monitoring data would meet the required air quality analysis, as specifically allowed under section 165(e)(2). Such guidance is given under

PSD SIP Revisions located elsewhere in today's **Federal Register** publication.

XVII. Notification

The proposal contained a requirement that certain construction projects exempt from PSD permit rules file a report at least 90 days in advance of the time that the exempted construction would commence. Notification requirements similar to those in the PSD proposal were also included in the proposed nonattainment rules, under 40 CFR 51.18(j) and 52.24, and Appendix S of Part 51 (the Emission Offset Interpretative Ruling). These notice requirements would apply to source construction which would not be subject to NSR solely because (1) the increase in emissions was offset by a contemporaneous decrease so as not to cause a significant net increase at the source (*see* Modification), or (2) the application of air pollution controls not generally required by the applicable SIP or 40 CFR 60 or 61, would lower the "potential to emit" of the source below the applicable threshold for permitting. The proposal would have required the submittal of comprehensive data for both new and existing emissions units at the stationary source and all other information needed by the reviewing authority to determine if the exemption reported by the source was proper. No formal applicability determination, however, was to be made and no major delays in the construction program of any such source were intended.

The Administrator believed such reporting was necessary because of the additional complexity of such determinations and the decreased number of sources subject to PSD due to changes in applicability rules. A need was apparent to record unreviewed emission increases and reductions occurring years apart at the same plant, in order to assess their impacts on air quality as well as to simply register in advance claims for reduction credits. For these reasons the Administrator proposed to use his authority under section 114 to monitor these determinations of offsetting emissions reductions and increased control efficiency. Section 114 authorizes the Administrator to require a source owner to provide such information as he may reasonably require in order to carry out Part C of the Act or to determine if a source owner is in violation of a SIP requirement.

Fifty-nine comments were received on the notification requirements. Only two comments completely supported the Agency proposal. Thirty-eight of the commenters felt that the requirements were unnecessary and not authorized by the Clean Air Act. Many stated that the requirements were burdensome and equivalent to a preconstruction permit process. Twenty-four commenters specifically stated that section 114 does not allow such a comprehensive data gathering requirement, although reasonable data gathering is allowed.

Those who thought the requirements unnecessary cited the adequacy of existing state permitting programs to deal with these problems and the possibility of post-construction recordkeeping to accomplish the same objectives. EPA was advised to take enforcement action against the few source owners who would incorrectly exempt a source from review and then construct the source without obtaining a permit, rather than risk pervasive construction delays of properly exempted sources. Many commenters felt that the administrative burden to both the reviewing agency and the source outweighed its benefits. Seventeen commenters specifically stated that the extra cost to source owners would remove the real incentives for early cleanup and would act to perpetuate the operation of older units with high air pollutant emissions.

The Administrator maintains that reporting similar to the preconstruction notice is needed and can be required under section 114. However, the comments, particularly those concerning the potential of existing state programs to accomplish this function, have caused EPA to reconsider the need at this time for a preconstruction notification requirement. State comments and meetings with several state representatives in Atlanta (*see* Docket account of III–D–4) indicate that all states currently learn of all proposed emission units and changes before such would commence construction. Most states acquire such knowledge through their existing general NSR procedures, approved under 40 CFR 51.18, even if a net decrease would occur at the source. Other states learn of proposed emission increases through notification letters filed by the source pursuant to a formal applicability determination.

Many states do not routinely require sources to record emission decreases, especially when such would occur well in advance of related emission increases. While a preconstruction notice would be desirable to document these decreases, the requirements for contemporaneous emission reduction credit (*see* Modification) are sufficient to fulfill this need. That is, emission reductions, in order to be creditable in offsetting any contemporaneous increase at the same stationary source, must be enforceable before the associated unit(s) with the emissions increase(s) commence construction. Such reductions, to be enforceable, must generally be made part of an enforceable operating or construction permit or be processed as a formal SIP revision. Although the Administrator is still concerned that sufficient information may not be available when a source owner wishes to document previous emissions reductions, he is opting for a "wait-and-see" approach in order to alleviate the concerns of the majority of the commenters who felt the notification requirements were unjustified and burdensome.

Also, since states will soon be administering the PSD program, it is best to allow them the flexibility to integrate notification requirements into their existing permit programs. The notification requirements in each state will be different, depending upon whether the state has an emission banking system and how it operates, the type of emission inventory system, and the information available from operating and construction permits. PSD increment tracking systems will also be set up by states, which can tailor informational requirements to their own tracking systems.

While today's regulations do not contain a formal preconstruction notice requirement, owners and operators are hereby put on notice for the following: (1) Sufficient records regarding the details of contemporaneous emission increases and decreases or applicable source determinations of "potential to emit" should be maintained so as to verify that no permit was required should the Administrator so require under section 114; (2) If experience in implementing the "no net increase" provisions of PSD applicability indicates that a more comprehensive notification system is required, the Administrator will promulgate an amendment to PSD and nonattainment regulations similar to the deleted provisions of the September 5 proposal; and (3) Any source which improperly avoids review and commences construction will be considered in violation of the applicable SIP and will be retroactively reviewed under the applicable NSR regulation.

XVIII. PSD SIP Revisions

Comments have been solicited on three aspects of the development of acceptable PSD plans by states. The issues are: (1) the authority of states to submit different but equally effective PSD programs, (2) state flexibility in defining baseline areas, and (3) state flexibility in allowing monitoring exemptions.

A. *Equivalent State Programs.* Under existing regulations, the Administrator cannot approve proposed state PSD regulations unless the state requirements are identical to or individually more stringent than the corresponding 40 CFR 51.24 regulations. While the Act does contain specific requirements for several major aspects of PSD programs, it does not prohibit states from using, in other areas, approaches equivalent to those of the federal regulations in order to meet the statutory objectives. Accordingly, the Administrator proposed on September 5, 1979 that states be given some flexibility in preparing PSD plans. The Administrator requested comment on such an approach and suggested portions of the PSD requirements for which equivalent approaches might be acceptable, and others for which alternative regulations would not be approvable. Where SIPs were allowed to differ, a test of overall equivalence was to be used based on the ability of the state system to capture as many emissions as would the 40 CFR 51.24 regulations.

All forty-nine comments on this topic strongly endorsed the general approach of giving states flexibility in developing PSD programs, although several commenters expressed the desire for a more extended area for SIP flexibility. Among those areas are: (1) the entire PSD program, (2) fugitive dust applicability, (3) modeling techniques, and (4) treatment of minor modifications and exempted sources. Another commenter asserted that EPA could hold the states responsible only for plans that addressed minimal requirements, such as maximum increment consumption.

After consideration of the comments, the Administrator has decided to treat PSD SIP revisions generally in the manner proposed. This means that states will be permitted to meet the following requirements of 40 CFR 51.24 with different but equivalent regulations, or implement the federal regulations with considerable discretion:

a. Baseline area.

b. Type and amount of data needed for monitoring purposes.

c. Temporary exclusions from increment consumption.

d. Defining "contemporaneous" as a reasonable period that may be greater or shorter than 5 years.

e. Banking of emissions reductions for future offsets.

f. Source information and analysis required of the applicant.

g. Public participation after providing the opportunity for public hearing.

h. Alternatives to first-come-first-served permit processing.

State PSD programs must follow the federal regulations in other matters. This includes, but is not limited to the following:

a. Maximum allowable increments.

b. Modeling techniques.

c. Class I area protection.

d. Notice to the Administrator or the applicable Federal Land Manager for prospective permit actions.

e. New (grass roots) major stationary source applicability.

f. NSPS, NESHAP minimum requirements for BACT determinations.

g. Definitions generally as contained in 40 CFR 51.24(b). (State definitions need not be verbatim translations, but must have the same effect).

The Agency is not expanding the area of state program flexibility to those four areas, noted earlier, that were suggested by the commenters. First, the Administrator does not believe that complete program flexibility is allowable under the Act, nor does he find a basis for the comment that EPA is without authority to require that SIPs include more than skeletal program components. The second suggestion, regarding fugitive dust, is not feasible at this time for reasons detailed elsewhere (*see* Fugitive Dust Exemption). With regard to the third comment, the Act specifically directs the Administrator to specify air quality models. Section 165(e)(3), 42 U.S.C. 7475(e)(3). In addition, national consistency is important for such air quality impact analysis in order to standardize how increment would be consumed or enhanced across the country.

With regard to the degree of state flexibility in exempting additional types of new and modified sources, EPA believes that adequate exemptions have been provided in today's regulations and no further ones are authorized under the Act. The Administrator wishes to note that today's rules allow a state the opportunity to change the time period defining contemporaneous emissions increases. This change affects the definition of major modification and thereby affects the number of PSD reviews.

The opportunity for states to change the time period within which emissions changes would be considered contemporaneous is not constrained by a test of equivalency. Rather, it should be considered by states in developing PSD SIPs in conjunction with their deliberations on alternatives to first-come-first-served permitting and emission offset banking. The Administrator believes these issues are related to the state's inherent flexibility under the Act to manage increment consumption.

B. Baseline Area

This aspect of the equivalent state program issue deals with the definition of the area for which the baseline date is triggered by a PSD permit application and, specifically, with whether this definition must be the same under a PSD SIP as it is in 40 CFR 52.21. The proposal defined baseline area for both 40 CFR 51 and 52 as every part of an affected AQCR designated attainment or unclassified on the baseline date. Comments were solicited concerning the desirability of allowing states to define "area" as any *portion* of an AQCR that had been designated as attainment or unclassifiable, or, conversely, to allow states to define "area" as the entire state.

All commenters specifically addressing the issue of allowing states to have flexibility in defining baseline area were in favor of that approach. Many were more specific, suggesting that 107 designated areas or source impact areas be used.

The Administrator has decided to allow flexibility to states, not by accepting alternative definitions in SIPs, but by defining baseline area in such manner as to allow flexibility. This change in definition arises from a revised legal interpretation of what meaning "area" may be given under the Act. (*see* Baseline Concentration). Baseline area is now defined as all areas (and every part therein) within the state that are designated attainment or unclassified under section 107(d)(1) (D) or (E) of the Act in which the source establishing the baseline date would locate or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) for the pollutant (SO_2 and/or TSP) for which the baseline date is established. Flexibility is inherent in state authority to redesignate areas under section 107. Thus, large tracts of land belonging to one clean or unclassified PSD area can later be divided into several smaller PSD baseline areas with potentially different baseline dates. Other than the limitations associated with processing 107 area redesignations as SIP revisions, EPA requires that area redesignations under section 107 cannot intersect or be smaller than the area of impact of any major stationary source or major modification which establishes a baseline date or is subject to PSD and would be constructed in the same state as the state proposing the redesignation. A baseline date will, therefore, be triggered for the entire designated section 107 area unless nonimpacted portions are redesignated to smaller areas.

This approach allows the flexibility requested by the commenters, but precludes "postage-stamp" designations designed to trigger baseline only in the immediate vicinity of the source. It also avoids the difficult area boundary problems which would arise from defining area as the PSD source impact area. States are cautioned to carefully weigh any inclination to postpone baseline dates through area redesignations against increased difficulties associated with tracking increment consumption.

C. State Monitoring Exemption

Alabama Power remanded to EPA that portion of the monitoring requirements which allowed states to accept less than one year of preconstruction monitoring data for cases in which a shorter period would be sufficient to perform a complete and adequate analysis. The court ruled that EPA had not provided adequate guidance to the states for making this determination. 13 ERC 1993, 2020.

The proposal contained concrete guidance for use by states in determining if less than one year of monitoring data is sufficient. That guidance provided that as little as four months of monitoring data for the criteria pollutants was acceptable if the applicant demonstrated that the maximum pollutant concentrations would occur within that time.

Fourteen comments were received on various aspects of this proposal. Thirteen commenters supported the flexibility of requiring less than one year of monitoring data under specified circumstances. Two commenters addressed ozone monitoring requirements where there were more than four months with average daily maximum temperatures greater than 20°C (68°F).

The Administrator has decided to promulgate the proposed regulations except for the following:

(1) Less than one year of monitoring data will be permitted for all regulated pollutants, rather than for just the criteria pollutants. However, it must be demonstrated through historical data or dispersion models that the data for such shorter periods of time, but not less than four months, will be obtained during a time period when maximum air quality levels can be expected.

(2) Guidance for monitoring ozone during the warmest four months of the year has been deleted. Monitoring for ozone, as well as other pollutants, will still be required during the time period when maximum air quality levels can be expected. Ozone concentrations will generally be higher during the warmest four months of the year. However, ozone monitoring must also be conducted when the yearly maximum ozone concentrations are likely to occur during months other than the warmest four months of the year. This will ensure that ozone monitoring will cover the expected maximum concentrations.

XIX. Additional Issues

A. Innovative Technology

In the September 5, 1979, Federal Register the Agency proposed a new paragraph (u) which sets out specific requirements for reviewing sources that wish to utilize innovative control technologies. The new paragraph sets out criteria to be used by the Administrator in determining whether a proposed control technology is innovative, in addition to establishing specific provisions for implementing the BACT and modeling requirements.

All of the commenters recognized the need to encourage the development of technology and generally approved of EPA's approach. One large environmental group commented that while it approved of the added flexibility in specifying BACT for innovative technologies, it was concerned that Class I areas might be compromised if increment violations were allowed to occur during the period of testing. We share this concern of the environmental group and are today promulgating a regulation which ensures full protection of Class I areas.

Today's amendments provide that, for a source whose technology has been designated as "innovative" by the Administrator, the BACT requirement should insure the installation of the innovative system and the adoption of a compliance schedule for meeting a final emission limitation. This final emission limitation must at least represent the BACT level that would have been initially defined under § 52.21(j), assuming the use of proven state-of-the-art technology. The compliance schedule may extend no more than 7 years after permit issuance or 4 years after startup of the source. The regulations also provide that the Administrator may withdraw his approval if a source: (1) fails to meet the final emissions limitation by the specified date, (2) fails to protect the public health, welfare, or safety, or (3) shows an indication that the innovative control system will not be successful. The source will then be given a period of no more than 3 years to come into compliance with the BACT level determined with the use of the demonstrated system of control.

The September 5 Federal Register proposed that with the consent of the governor an "innovative technology" source could conduct the increment impact analysis using the final emission limitation specified in the permit, provided that no interference with applicable NAAQS would result during the interim period. EPA reasoned that any increased level of emissions which might occur during the interim period would be temporary and would not significantly impact the increments. However, one of the commenters pointed out that Class I areas require protection even from temporary violations. We agree with the concerns of this commenter and cite § 52.21(i)(7) in their support. That section exempts temporary sources from the modeling requirements except when they impact Class I areas or areas where the increment is known to be violated. Today's regulations allow an "innovative" source to use its final emission limitation for increment modeling purposes, but only if there is no impact on any Class I area or any area with a known increment violation. As in the proposal, the final rules requiring modeling for the purpose of evaluating the impact on NAAQS must take into account interim emission projections. Under no condition may a source be approved if it would cause a violation of the NAAQS, even a temporary violation.

B. Modified Permits

In the September 5, 1979 Federal Register, EPA proposed to add a new paragraph (t) entitled "Modified Permits." The new paragraph provided a simplified approval procedure for sources that make minor changes in design capacity or in the nature of process equipment between the time they obtain a PSD permit and the time they complete construction. It also required prior approval, through permit modifications, of increases in hours of operation.

The comments on this section were mixed. Some commenters felt that the new paragraph was redundant and superfluous, while others generally approved of it but asked for clarification. Upon further consideration, the Agency believes that there is a need to distinguish between situations in which permits would be changed for primarily administrative reasons, such as a change to reflect a revised construction schedule, and situations in which the permit change involves a significant increase in emissions. In the latter case a new permit must be issued; in the former, however, an abbreviated procedure involving modification of the permit might be preferable. There are numerous issues to be considered in implementing such an approach. These include the means to differentiate between significant and nonsignificant changes, and the specific procedural requirements for modifying a permit. Those issues were not adequately addressed in the proposal and for that reason the Agency has decided that it does not have a sufficient basis for completing rulemaking at this time. However, further rulemaking is being considered for future proposal and comment will be requested on the issues at that time.

C. Nonprofit Institutions

EPA proposed on September 5 to exempt modifications of nonprofit institutions from PSD review requirements as is already done for new construction of this type. This would mean that, upon written request by the governor of the state, a PSD permit would not be required of a major stationary source or major modification that qualifies as a nonprofit health or educational institution. Today the Administrator promulgates this exemption as proposed since no signficant public comment was received. It should be noted that although such major new or modified sources would not require a PSD permit, the emissions from these sources would consume the applicable PSD increment(s) after January 6, 1975.

D. Portable Sources

With regard to portable sources, EPA proposed to change the 30 day notice to a 10 day notice for previously permitted PSD sources wishing to relocate. Based on experience in implementing the PSD regulations, and having received no adverse public comments on this proposal, the Administrator is adopting this proposal with one exception. Sources with PSD permits must provide a notice to the reviewing authority not less than ten days before relocation activities would commence, unless the Administrator has previously approved a different minimum time for relocation notice.

The Administrator would also like to clarify that a source is portable only if it would have temporary location and temporary emissions. Existing EPA policy defines temporary emissions as emissions from a stationary source that would be less than two years in duration, unless the Administrator determines that a longer time period would be appropriate. Thus, for a portable source to qualify for the above exemption, it must typically be located at the new location less than two years.

E. Secondary Emissions

Desiring to make the PSD review requirements similar to nonattainment requirements wherever possible, the Administrator proposed to add the definition of secondary emissions found in the offset ruling (44 FR 3274) to the PSD regulations. *See* 43 FR 26403. Secondary emissions would mean emissions from new or existings sources which occur as a result of the construction and/or operation of a major source or major modification, but do not necessarily come from the source itself. Secondary emissions would include:

(a) emissions from ships or trains coming to or from a source or modification; or

(b) emissions from offsite support sources which would otherwise increase emissions as a result of construction or operation of a major source. Although reasonably quantifiable secondary emissions would be reviewed in the air quality anaylsis, such emissions would not be included in determining "potential" emissions.

Public reaction to the September 5, 1979 proposal and the final *Alabama Power* opinion regarding EPA's treatment of secondary emissions was small. Generally the commenters favored the exclusion of secondary emissions from the PSD permit process altogether. Their objections centered on the availability and reliability of the emission factor data to "reasonably" quantify secondary emissions. Also the possibility of redundant reviews was highlighted by several commenters. The Administrator, in weighing these comments, has decided to promulgate the regulations addressing secondary emissions as proposed on September 5, 1979. *See* 40 CFR 51.24(b)(3), 52.21(b)(3), 51.24(b)(20), and 52.21(b)(20).

The Clean Air Act clearly calls for a detailed and extensive air quality impact assessment. For instance, each permit application must include impacts from the growth projected in the area that would occur as a result of the proposed source's construction. *See* section 165(a)(6). Also, once the baseline date is set, such emissions would consume the maximum allowable increments, so each permit decision must give consideration to all the possible ramifications of allowing a source or modification to construct. *See* section 165(a)(3) ("cause or *contribute*"). Secondary emissions must be considered when those emissions are specific, well defined, reasonably quantifiable, and impact the same general area.

F. Baseline for Calculating Offsets Under Section 173(1)(A)

The Offset Ruling sets out rules and guidance for determining the baseline for calculating emissions offset credit, as well as guidance on the location of offsetting emissions. *See* 40 CFR Part 51, Appendix S, Sections IV.C. and D. To aid the states in developing their NSR regulations for nonattainment areas, or in revising those regulations, EPA has decided to promulgate those rules and guidance in § 51.18(j)(3).[14] The langauge promulgated today is identical to that used in the Offset Ruling, except as explained below.

On January 16, 1979, EPA modified the Offset Ruling to conform to section 129(a)(1) of the Act by setting the baseline for determining emissions offset credit at the emissions level specified for the source in the applicable SIP. EPA is retaining this baseline level for the Offset Ruling. However, the approach for NSR programs adopted pursuant to section 173 is slightly different. Section 173(1)(A) sets the baseline as the "allowable" emissions of the source, but it further specifies that the offsets obtained by the source must be sufficient to represent reasonable further progress (RFP). Some Part D SIP revisions approved by EPA have demonstrated attainment and RFP based on the allowable emissions of sources in a nonattainment area. However, many Part D SIP revisions have based their demonstrations on the *actual* emissions of the sources in a nonattainment area, rather than the sources' allowable emissions. This means that to be consistent with RFP, sources must reduce their actual, rather than their allowable, emissions. Otherwise, sources could claim credit for offsets in situations where the offset would actually interfere with RFP.[15]

To accommodate the different approaches to RFP, EPA has provided that the baseline for determining emissions offset credit shall be the allowable emissions of the source, where the SIP relies upon allowable emissions to demonstrate RFP; but the baseline must be actual emissions where the demonstration is based on reductions in actual emissions. EPA believes for the reasons discussed above that this approach is necessary to assure RFP towards attainment of ambient air quality standards.

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[14] On January 16, 1979, EPA solicited comments on certain aspects of the Offset Ruling, none of which directly concerned the matters published today. EPA will respond to those comments after today's promulgation.

[15] For example, suppose a source's allowable emissions are 1,000 tpy, and its actual emissions are 500 tpy. Now suppose it wants to add a new emissions unit, thereby adding 100 tpy, and the SIP requires a 100 tpy reduction for RFP. The source might achieve both objectives by decreasing its total allowable emissions to 900 tpy, i.e., it adds the 100 tpy for the new facility, but makes other reductions in allowable emissions of 200 tpy. This is adequate if the RFP demonstration relies upon allowable emissions, since the source started at 1,000 typ and now is at 900 tpy. But if RFP is based on actual emissions, then there is a *loss* of 100 tpy, because RFP assumed 500 tpy and now the source emits 600 tpy.

G. Economic Impact Assessment

In the September 5 proposal, it was stated that the Agency would prepare an economic impact assessment of the proposed changes after the final court opinion was issued, which took place on December 14, 1979. The Agency further indicated that it would make the report available for public comment prior to promulgation, and that any resulting comments would be taken into account in the promulgated regulations.

Although the results of the impact assessment released today have been considered in developing the regulations, primarily for understanding *de minimis* effects, it has not been possible to complete the assessment in time to get comments prior to promulgation. In fact, because of the inherent complexity of the program, it has not been possible to do a true economic impact assessment (*i.e.*, one which considers impacts on market positions, prices, closures, etc.).

The document made available today presents as assessment of the overall impact of the proposed regulations with respect to several of the major issues or changes in the proposed regulations. The assessment does not attempt to quantify the impact of every issue nor does it attempt to assess the overall impact associated with the implementation of the PSD regulations in general. It is designed to provide a relative assessment of the impact of the September 5 proposal versus the June 1978 regulations in terms of the: sources to be affected, their associated emissions, major requirements which must be met (or which are no longer required to be met), and estimated cost savings for sources no longer subject to PSD review as a result of the proposed regulations. In short, the analysis provides an estimate of differential cost impact of the 1978 versus the proposed PSD regulations and an assessment of the major issues associated with the proposed PSD regulations.

As noted, the assessment focused on the difference between the June 1978 regulations and those proposed on September 5. However, there are significant changes in the promulgated regulations compared to those proposed, especially with regard to the *de minimis* values. Since these values have a major impact on expected cost, a projection of the impact of the final regulations was also made.

It is estimated that there will be a savings as a result of the promulgation for sources which would have been subject to the old regulations but which would not be subject to the new. This would represent an annual savings of $2.2 to 6.1 million assuming the sources which have received permits from April 1978 to November 1979 are representative of those which will receive permits in the future.

Although there is an overall savings for sources which would not longer be subject to PSD review, the new regulations require more extensive review for some sources, as well as review of sources which were not previously covered; that is, modified sources with uncontrolled emissions of less than 100 or 250 tons per year but which have controlled emissions greater than *de minimis*. Since these sources are not now subject to PSD review, they would be required to prepare a PSD permit, conduct the necessary air quality impact assessments, incur some delays in construction as a result of undergoing PSD review in addition to state NSR review, and install BACT instead of just meeting the emissions limits required by the State Implementation Plan or New Source Performance Standards as applicable. As a result of the additional cost incurred because of more extensive review and by the sources not currently subject to PSD, the overall effect of the promulgated regulations (including the savings described above) is an increase of approximately $12.4 to 24.5 million per year.

The complete analysis is contained in the document entitled *Regulatory Impact Assessment for the September 5, 1979 Proposed Prevention of Significant Deterioration Regulations*, EPA-450/2-80-073. This document is available for inspection in the rulemaking docket. Copies may be obtained by writing to the Air Information Center, U.S. EPA Library Services, (MD-35), Research Triangle Park, NC 27711.

H. Consolidated Permit Regulations

As mentioned in the section on TRANSITION, EPA recently promulgated regulations, known as the Consolidated Permit Regulations, which now generally govern the processing of applications for permits under Part 52 PSD regulations. Among the regulatory amendments announced here are three minor changes to the Consolidated Permit Regulation. First, EPA has deleted the substantive language of 40 CFR 124.3(b) and put "Reserved" in its place. Section 124.3(b) related primarily to the 50-ton exemptions of the 1978 Part 52 regulations. With the deletion of those exemptions, § 124.3(b) would have become superfluous. Second, EPA has conformed 40 CFR 124.5(g)(2) to the numbering in the new Part 52 regulations. Finally, the agency has corrected 40 CFR 124.42(b) by substituting "submitted" for "requested."

Final Action

The following regulatory amendments are nationally applicable, and this action is based upon determinations of nationwide scope and effect. Therefore, under section 307(b)(1) of the Act, judicial review may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for judicial review must be filed on or before October 6, 1980.

(Sections 101(b)(1), 110, 160-169, 171-178, and 301(a) of the Clean Air Act as amended (42 U.S.C. 7401(b)(1), 7410, 7470-7479, 7501-7508, and 7601(a)); Section 129(a) of the Clean Air Act Amendments of 1977 (Pub. L. No. 95-95, 91 Stat. 685 (August 7, 1977)))

Dated: July 31, 1980.

Douglas M. Costle,

Administrator.

State Plans For New Source Review For PSD Purposes

1. Section 51.24 of Title 40 of the Code of Federal Regulations is amended by deleting paragraph (k) and redesignating paragraphs (l) through (s) as (k) through (r) and then by revising paragraphs (a)(2), (b), (f), (i)-(k), (m) and (r) and adding new paragraphs (a)(6) and (s) to read as follows:

§ 51.24 Prevention of significant deterioration of air quality.

(a)(1) *Plan Requirements*

* * * * *

(2) *Plan Revisions*. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph

(a)(4) shall review the expected impact to the applicable increment(s).

* * * * *

(6) *Amendments.* (i) Any state required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph, shall adopt and submit such plan revision to the Administrator for approval before May 7, 1981.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) "Major stationary source" means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(*a*) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) as a major stationary source if the change would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds shall be considered major for ozone.

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

(*b*) Use of an alternative fuel or raw material by reason of any order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*2*) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24;

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(*g*) Any change in ownership at a stationary source.

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs within a reasonable period (to be specified by the state) before the date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*c*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vii) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of

operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(6) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(7) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(9) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(11) "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation this term refers to those on-site activities, other than preparatory activities, which mark the initiation of the change.

(12) "Best available control technology" means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each pollutant subject to regulation under the Act which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Parts 60 and 61. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(13)(i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

(*a*) The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph (b)(13)(ii);

(*b*) The allowable emissions of major stationary sources which commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

(ii) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(*a*) Actual emission from any major stationary source on which construction commenced after January 6, 1975; and

(*b*) Actual emissions increases and decreases at any stationary source occurring after the baseline date.

(14)(i) "Baseline date" means the earliest date after August 7, 1977, that:

(*a*) A major stationary source or major modification subject to 40 CFR 52.21 submits a complete application under that section; or

(*b*) A major stationary source or major modificatioin subject to regulations approved pursuant to 40 CFR 51.24 submits a complete application under such regulations.

(ii) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(*a*) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(i) (D) or (E) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24; and

(*b*) In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(15)(i) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d)(1) (D) or (E) of the Act in which the major source or major modification establishing the baseline date would construct or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) of the pollutant for which the baseline date is established.

(ii) Area redesignations under section 107(d)(1) (D) or (E) of the Act cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

(*a*) Establishes a baseline date; or

(*b*) Is subject to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24, and would be constructed in the same state as the state proposing the redesignation.

(16) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits

which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards as set forth in 40 CFR Parts 60 and 61;

(ii) The applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition.

(17) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(18) "Secondary emissions" means emissions which occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purposes of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general areas the stationary source modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source; and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(19) "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

(20) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with subparagraphs (ii)–(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(22) "Complete" means, in reference to an application for a permit, that the application contains all the information necessary for processing the application. Designating an application complete for purposes of permit processing does not preclude the reviewing authority from requesting or accepting any additional information.

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

(ii) "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) does not list, any emissions rate.

(iii) Notwithstanding paragraph (b)(23)(i), "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24-hour average).

(24) "Federal Land Manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(25) "High terrain" means any area having an elevation 900 feet or more above the base of the stack of a source.

(26) "Low terrain" means any area other than high terrain.

(27) "Indian Reservation" means any federally recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(28) "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

* * * * *

(f) *Exclusions from increment consumption.* (1) The plan may provide that the following concentrations shall be excluded in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide or particulate matter from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4).

(2) If the plan provides that the concentrations to which paragraph (f)(1) (i) or (ii) refers shall be excluded, it shall also provide that no exclusion of such concentrations shall apply more than five years after the effective date of the

order to which paragraph (f)(1)(i) refers or the plan to which paragraph (f)(1)(ii) refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) No exclusion under paragraph (f) of this section shall occur later than 9 months after August 7, 1980, unless a State Implementation Plan revision meeting the requirements of 40 CFR 51.24 has been submitted to the Administrator.

(4) For purposes of excluding concentrations pursuant to paragraph (f)(1)(v), the Administrator may approve a plan revision that:

(i) Specifies the time over which the temporary emissions increase of sulfur dioxide or particulate matter would occur. Such time is not to exceed two years in duration unless a longer time is approved by the Administrator;

(ii) Specifies that the time period for excluding certain contributions in accordance with paragraph (f)(4)(i) is not renewable;

(iii) Allows no emissions increase from a stationary source which would:

(*a*) Impact a Class I area or an area where an applicable increment is known to be violated; or

(*b*) Cause or contribute to the violation of a national ambient air quality standard;

(iv) Requires limitations to be in effect the end of the time period specified in accordance with paragraph (f)(4)(i) which would ensure that the emissions levels from stationary sources affected by the plan revision would not exceed those levels occurring from such sources before the plan revision was approved.

* * * * *

(i) *Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions.*

(1) The plan shall provide that no major stationary source or major modification shall begin actual construction unless, as a minumum, requirements equivalent to those contained in paragraphs (j) through (r) of this section have been met.

(2) The plan shall provide that the requirements equivalent to those contained in paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section would otherwise allow.

(3) The plan shall provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section apply only to any major stationary source or major modification that would be constructed in an area which is designated as attainment or unclassifiable under section 107(a)(1) (D) or (E) of the Act; and

(4) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a particular major stationary source or major modification if:

(i) The major stationary source would be a nonprofit health or nonprofit educational institution or a major modification that would occur at such an institution; or

(ii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and such source does not belong to any following categories:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

(iii) The source or modification is a portable stationary source which has previously received a permit under requirements equivalent to those contained in paragraphs (j) through (r) of this section, if:

(*a*) The source proposes to relocate and emissions of the source at the new location would be temporary; and

(*b*) The emissions from the source would not exceed its allowable emissions; and

(*c*) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(*d*) Reasonable notice is given to the reviewing authority prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the reviewing authority not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the reviewing authority.

(5) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act.

(6) The plan may provide that requirements equivalent to those contained in paragraphs (k), (m), and (o) of this section do not apply to a proposed major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from a new source, or the net emissions increase of that pollutant from a modification, would be temporary and impact no Class I area and no area where an applicable increment is known to be violated.

(7) The plan may provide that requirements equivalent to those contained in paragraphs (k), (m), and (o) of this section as they relate to any maximum allowable increase for a Class II area do not apply to a modification of a major stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the Act from the modification after the application of best available control technology would be less than 50 tons per year.

(8) The plan may provide that the reviewing authority may exempt a proposed major stationary source or major modification from the requirements of paragraph (m) with

respect to monitoring for a particular pollutant, if:

(i) The emissions increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the following amounts:

(*a*) Carbon monoxide—575 ug/m^3, 8-hour average;

(*b*) Nitrogen dioxide—14 ug/m^3, annual average;

(*c*) Total suspended particulates—10 ug/m^3, 24-hour average;

(*d*) Sulfur dioxide—13 ug/m^3, 24-hour average;

(*e*) Ozone[1]

(*f*) Lead—0.1 ug/m^3, 24-hour average;

(*g*) Mercury—0.25 ug/m^3, 24-hour average;

(*h*) Beryllium—0.0005 ug/m^3, 24-hour average;

(*i*) Fluorides—0.25 ug/m^3, 24-hour average;

(*j*) Vinyl chloride—15 ug/m^3, 24-hour average;

(*k*) Total reduced sulfur—10 ug/m^3, 1-hour average;

(*l*) Hydrogen sulfide—0.04 ug/m^3, 1-hour average;

(*m*) Reduced sulfur compounds—10 ug/m^3, 1-hour average; or

(ii) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in (i)(8)(i); or

(iii) The pollutants is not listed in paragraph (i)(8)(i).

(9) If EPA approves a plan revision under 40 CFR 51.24 as in effect before August 7, 1980, any subsequent revision which meets the requirements of this section may contain transition provisions which parallel the transition provisions of 40 CFR 52.21(i)(9), (i)(10) and (m)(1)(v) as in effect on that date, which provisions relate to requirements for best available control technology and air quality analyses. Any such subsequent revision may not contain any transition provision which in the context of the revision would operate any less stringently than would its counterpart in 40 CFR 52.21.

(j) *Control Technology Review.* The plan shall provide that:

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emission standards and standard of performance under 40 CFR Parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the Act that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each pollutant subject to regulation under the Act for which it would be a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the least reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source Impact Analysis.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reduction (including secondary emissions) would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

(l) *Air Quality Models.*

* * * * *

(m) *Air Quality Analysis.* (1) Preapplication analysis.

(i) The plan shall provide that any application for a permit under regulations approved pursuant to this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to emit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) The plan shall provide that, with respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the reviewing authority determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) The plan shall provide that with respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maxiumum allowable increase.

(iv) The plan shall provide that, in general, the continuous air monitoring data that is required shall have been gathered over a period of one year and shall represent the year preceding receipt of the application, except that, if the reviewing authority determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(v) The plan may provide that the owner or operator of a proposed major stationary source or major modification of volatile organic compounds who satisfies all conditions of 40 CFR Part 51 Appendix S, section IV may provide postapproval monitoring data for ozone in lieu of providing preconstruction data as required under paragraph (m)(1).

(2) Post-construction monitoring. The plan shall provide that the owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the reviewing authority determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

(3) Operation of monitoring stations. The plan shall provide that the owner or operator of a major stationary source or major modification shall meet the requirements of Appendix B to Part 58 of this chapter during the operation of monitoring stations for purposes of satisfying paragraph (m) of this section.

(n) *Source Information.*

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(o) *Additional Impact Analyses.*

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(p) *Sources Impacting Federal Class I Areas—Additional Requirements.*

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(q) *Public Participation.*

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[1] No *de minimis* air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to PSD would be required to perform and ambient impact analysis, including the gathering of ambient air quality data.

(r) *Source Obligation.* (1) The plan shall include enforceable procedures to provide that approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, state or federal law.

(2) The plan shall provide that at such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

(s) *Innovative Control Technology.* (1) The plan may provide that an owner or operator of a proposed major stationary source or major modification may request the reviewing authority to approve a system of innovative control technology.

(2) The plan may provide that the reviewing authority may, with the consent of the governor(s) of other affected state(s), determine that the source or modification may employ a system of innovative control technology, if:

(i) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(ii) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph (j)(2) by a date specified by the reviewing authority. Such date shall not be later than 4 years from the time of startup or 7 years from permit issuance;

(iii) The source or modification would meet the requirements equivalent to those in paragraphs (j) and (k) based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the reviewing authority;

(iv) The source or modification would not before the date specified by the reviewing authority:

(*a*) Cause or contribute to any violation of an applicable national ambient air quality standard; or

(*b*) Impact any Class I area; or

(c) Impact any area where an applicable increment is known to be violated;

(v) All other applicable requirements including those for public participation have been met.

(3) The plan shall provide that the reviewing authority shall withdraw any approval to employ a system of innovative control technology made under this section, if:

(i) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate; or

(ii) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(iii) The reviewing authority decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

(4) The plan may provide that if a source or modification fails to meet the required level of continuous emissions reduction within the specified time period, or if the approval is withdrawn in accordance with paragraph (s)(3), the reviewing authority may allow the source or modification up to an additional 3 years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

New Source Review For PSD Purposes

2. (a) Section 52.21 of Title 40 of the Code of Federal Regulations is amended by deleting paragraph (k) and redesignating paragraphs (l) through (v) as (k) through (u) and then by revising paragraphs (b), (f), (i), (j), (k) and (g) and adding new paragraphs (r)(4), (v) and (w) as follows:

§ 52.21. Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions.* For the purposes of this section:

(1)(i) "Major stationary source" means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) as a major stationary source, if the changes would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair and replacement;

(*b*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plant pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21

or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(2) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24;

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(g) Any change in ownership at a stationary source.

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(a) Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source; and

(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(a) The date five years before construction on the particular change commences; and

(b) The date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in issuing a permit for the source under this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(a) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(b) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(c) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(viii) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(6) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

(7) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(9) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(11) "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activites other than preparatory activities which mark the initiation of the change.

(12) "Best available control technology" means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Parts and 60 and 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the impostion of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such

design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(13)(i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

(*a*) The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph (b)(13)(ii);

(*b*) The allowable emissions of major stationary sources which commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

(ii) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(*a*) Actual emissions from any major stationary source on which construction commenced after January 6, 1975; and

(*b*) Actual emissions increases and decreases at any stationary source occurring after the baseline date.

(14)(i) "Baseline date" means the earliest date after August 7, 1977, on which the first complete application under 40 CFR 52.21 is submitted by a major stationary source or major modification subject to the requirements of 40 CFR 52.21.

(ii) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(*a*) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(i) (D) or (E) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21; and

(*b*) In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(15)(i) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d)(1) (D) or (E) of the Act in which the major source or major modification establishing the baseline date would construct or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) of the pollutant for which the baseline date is established.

(ii) Area redesignations under section 107(d)(1) (D) or (E) of the Act cannot intersect or be smaller than the area of impact of any mjaor stationary source or major modification which:

(*a*) Establishes a baseline date; or

(*b*) Is subject to 40 CFR 52.21 and would be constructed in the same state as the state proposing the redesignation.

(16) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards as set forth in 40 CFR Parts 60 and 61;

(ii) The applicable State Implemenation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(17) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 and 40 CFR 51.24.

(18) "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source; and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(19) "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

(20) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with subparagraphs (ii)–(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedies the particular date and which is representative of normal source operation. The Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The Administrator may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(22) "Complete" means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application.

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

(ii) "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) does not list, any emissions rate.

(iii) Notwithstanding paragraph (b)(23)(i), "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$, (24-hour average).

(24) "Federal Land Manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(25) "High terrain" means any area having an elevation 900 feet or more above the base of the stack of a source.

(26) "Low terrain" means any area other than high terrain.

(27) "Indian Reservation" means any federally recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(28) "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of selfgovernment.

* * * * *

(f) *Exclusions from increment consumption.* (1) Upon written request of the governor, made after notice and opportunity for at least one public hearing to be held in accordance with procedures established in 40 CFR 51.4, the Administrator shall exclude the following concentrations in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide or particulate matter from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4).

(2) No exclusion of such concentrations shall apply more than five years after the effective date of the order to which paragraph (f)(1)(i) refers or the plan to which paragraph (f)(1)(ii) refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) No exclusion under paragraph (f) of this section shall occur later than 9 months after August 7, 1980, unless a State Implementation Plan revision meeting the requirements of 40 CFR 51.24 has been submitted to the Administrator.

(4) For purposes of excluding concentrations pursuant to paragraph (f)(1)(v), the proposed plan revision shall:

(i) Specify the time over which the temporary emissions increase of sulfur dioxide or particulate matter would occur. Such time is not to exceed two years in duration unless a longer time is approved by the Administrator;

(ii) Specify that the time period for excluding certain contributions in accordance with paragraph (f)(4)(i) is not renewable;

(iii) Allow no emissions increase from a stationary source which would:

(*a*) Impact a Class I area or an area where an applicable increment is known to be violated; or

(*b*) Cause or contribute to the violation of a national ambient air quality standard;

(iv) Require limitations to be in effect at the end of the time period specified in accordance with paragraph (f)(4)(i) which would ensure that the emissions levels from stationary sources affected by the plan revision would not exceed those levels occurring from such sources before the plan revision was approved.

* * * * *

(i) *Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions.* (1) No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Administrator has authority to issue any such permit.

(2) The requirements of paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section otherwise provides.

(3) The requirements of paragraphs (j) through (r) of this section apply only to any major stationary source or major modification that would be constructed in an area designated as attainment or unclassifiable under section 107(d)(1)(D) or (E) of the Act.

(4) The requirements of paragraphs (j) through (r) of this section shall not apply to a particular major stationary source or major modification, if;

(i) Construction commenced on the source or modification before August 7, 1977. The regulations at 40 CFR 52.21 as in effect before August 7, 1977, shall govern the review and permitting of any such source or modification; or

(ii) The source or modification was subject to the review requirements of 40 CFR 52.21(d)(i) as in effect before March 1, 1978, and the owner or operator:

(*a*) Obtained under 40 CFR 52.21 a final approval effective before March 1, 1978;

(*b*) Commenced construction before March 19, 1979; and

(*c*) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(iii) The source or modification was subject to 40 CFR 52.21 as in effect before March 1, 1978, and the review of an application for approval for the stationary source or modification under 40 CFR 52.21 would have been completed by March 1, 1978, but for an extension of the public comment period pursuant to a request for such an extension. In such a case, the application shall continue to be processed, and granted or denied, under 40 CFR 52.21 as in effect prior to March 1, 1978; or

(iv) The source or modification was not subject to 40 CFR 52.21 as in effect before March 1, 1978, and the owner or operator:

(*a*) Obtained all final federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before March 1, 1978;

(*b*) Commenced construction before March 19, 1979; and

(*c*) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(v) The source or modification was not subject to 40 CFR 52.21 as in effect on June 19, 1978 or under the partial stay of regulations published on February 5, 1980 (45 FR 7800), and the owner or operator:

(a) Obtained all final federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

(b) Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

(c) Did not discontinuue construction for a period of 18 months or more and completed construction within a reasonable time; or

(vi) The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor of the state in which the source or modification would be located requests that it be exempt from those requirements; or

(vii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) Hydrofluoric, sulfuric, or nitric acid plants;

(j) Petroleum refineries;

(k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal production plants;

(t) Chemical process plants;

(u) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(v) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

(viii) The source is a portable stationary source which has previously received a permit under this section, and

(a) The owner or operator proposes to relocate the source and emissions of the source at the new location would be temporary; and

(b) The emissions from the source would not exceed its allowable emissions; and

(c) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(d) Reasonable notice is given to the Administrator prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the Administrator not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the Administrator.

(5) The requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act.

(6) The requirements of paragraphs (k), (m) and (o) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from the source, or the net emissions increase of that pollutant from the modification:

(i) Would impact no Class I area and no area where an applicable increment is known to be violated, and

(ii) Would be temporary.

(7) The requirements of paragraphs (k), (m) and (o) of this section as they relate to any maximum allowable increase for a Class II area shall not apply to a major modification at a stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the Act from the modification after the application of best available control technology would be less than 50 tons per year.

(8) The Administrator may exempt a stationary source or modification from the requirements of paragraph (m) with respect to monitoring for a particular pollutant if:

(i) The emissions increase of the pollutant from the new source or the net emissions increase of the pollutant from the modification would cause, in any area, air quality impacts less than the following amounts:

Carbon monoxide—575 μg/m^3, 8-hour average;

Nitrogen dioxide—14 μg/m^3, annual average;

Total suspended particulate—10 μg/m^3, 24-hour average;

Sulfur dioxide—13 μg/m^3, 24-hour average;

Ozone; [3]

Lead—0.1 μg/m^3, 24-hour average;

Mercury—0.25 μg/m^3, 24-hour average;

Beryllium—0.0005 μg/m^3, 24-hour average;

Fluorides—0.25 μg/m^3, 24-hour average;

Vinyl chloride—15 μg/m^3, 24-hour average;

Total reduced sulfur—10 μg/m^3, 1-hour average;

Hydrogen sulfide—0.04 μg/m^3, 1-hour average;

Reduced sulfur compounds—10 μg/m^3, 1-hour average; or

(ii) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in paragraph (i)(8)(i), or the pollutant is not listed in paragraph (i)(8)(i).

(9) The requirements for best available control technology in paragraph (j) of this section and the requirements for air quality analyses in paragraph (m)(1) shall not apply to a particular stationary source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submitted an application for a permit under those regulations before August 7, 1980, and the Administrator subsequently determines that the application as submitted before that date was complete. Instead, the requirements at 40 CFR 52.21(j) and (n) as in effect on June 19, 1978 apply to any such source or modification.

(10)(i) The requirements for air quality monitoring in paragraphs (m)(1)(ii)-(iv) of this section shall not apply to a particular source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete with respect to the requirements of this section other than those in paragraphs (m)(1)(ii)-(iv) and with respect to the requirements for such analyses at 40 CFR 52.21(m)(2) as in effect on June 19, 1978. Instead, the latter requirements shall apply to any such source or modification.

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[3] No *de minimis* air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to PSD would be required to perform an ambient impact analysis including the gathering of ambient air quality data.

(ii) The requirements for air quality monitoring in paragraphs (m)(1)(ii)-(iv) of this section shall not apply to a particular source or modification that was not subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements in paragraphs (m)(1)(ii)-(iv).

(j) *Control Technology Review.* (1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR Parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the Act that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each pollutant subject to regulation under the Act for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source Impact Analysis.* The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

(l) *Air Quality Models.*

* * * * *

(m) *Air Quality Analysis.* (1) Preapplication analysis.

(i) Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to omit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) With respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the Administrator determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(iv) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application, except that, if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(v) For any application which becomes complete, except as to the requirements of paragraph (m)(1) (iii) and (iv), between June 8, 1981, and February 9, 1982, the data that paragraph (m)(1)(iii) requires shall have been gathered over at least the period from February 9, 1981, to the date the application becomes otherwise complete, except that:

(*a*) If the source or modification would have been major for that pollutant under 40 CFR 52.21 as in effect on June 19, 1978, any monitoring data shall have been gathered over at least the period required by those regulations.

(*b*) If the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than four months), the data that paragraph (m)(1)(iii) requires shall have been gathered over at least that shorter period.

(*c*) If the monitoring data would relate exclusively to ozone and would not have been required under 40 CFR 52.21 as in effect on June 19, 1978, the Administrator may waive the otherwise applicable requirements of this paragraph (v) to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

(vi) The owner or operator of a proposed stationary source or modification of violatile organic compounds who satisfies all conditions of 40 CFR Part 51 Appendix S, section IV may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as requried under paragraph (m)(1).

(2) Post-construction monitoring. The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the Administrator determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

(3) Operations of monitoring stations. The owner or operator of a major stationary source or major modification shall meet the requirements of Appendix B to Part 58 of this chapter during the operation of monitoring stations for purposes of satisfying paragraph (m) of this section.

(n) *Source Information.*

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(o) *Additional Impact Analyses.*

* * * * *

(p) *Sources Impacting Federal Class I Areas—Additional Requirements.*

* * * * *

(q) *Public Participation.* The Administrator shall follow the applicable procedures of 40 CFR Part 124 in processing applications under this section. The Administrator shall follow the procedures at 40 CFR 52.21(r) as in effect on June 19, 1978, to the extent that the procedures of 40 CFR Part 124 do not apply.

(r) *Source Obligation.*

* * * * *

(4) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

* * * * *

(s) *Environmental Impact Statements.*

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(t) *Disputed Permits or Redesignations.*

* * * * *

(u) *Delegation of Authority.*

* * * * *

(v) *Innovative Control Technology.* (1) An owner or operator of a proposed major stationary source or major modification may request the Administrator in writing no later than the close of the comment period under 40 CFR 124.10 to approve a system of innovative control technology.

(2) The Administrator shall, with the consent of the governor(s) of the affected state(s), determine that the source or modification may employ a system of innovative control technology, if:

(i) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(ii) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph (j)(2) by a date specified by the Administrator. Such date shall not be later than 4 years from the time of startup or 7 years from permit issuance;

(iii) The source or modification would meet the requirements of paragraphs (j) and (k) based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the Administrator;

(iv) The source or modification would not before the date specified by the Administrator:

(*a*) Cause or contribute to a violation of an applicable national ambient air quality standard; or

(*b*) Impact any Class I area; or

(*c*) Impact any area where an applicable increment is known to be violated; and

(v) All other applicable requirements including those for public participation have been met.

(3) The Administrator shall withdraw any approval to employ a system of innovative control technology made under this section, if:

(i) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate; or

(ii) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(iii) The Administrator decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

(4) If a source or modification fails to meet the required level of continuous emission reduction within the specified time period or the approval is withdrawn in accordance with paragraph (v)(3), the Administrator may allow the source or modification up to an additional 3 years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

(w) *Permit rescission.* (1) Any permit issued under this section or a prior version of this section shall remain in effect, unless and until it expires under paragraph (s) of this section or is rescinded.

(2) Any owner or operator of a stationary source or modification who holds a permit for the source or modification which was issued under 40 CFR 52.21 as in effect on June 19, 1978, may request that the Administrator rescind the permit or a particular portion of the permit.

(3) The Administrator shall grant an application for rescission if the application shows that this section would not apply to the source or modification.

(4) If the Administrator rescinds a permit under this paragraph, the public shall be given adequate notice of the rescission. Publication of an announcement of rescission in a newspaper of general circulation in the affected region within 60 days of the rescission shall be considered adequate notice.

2. (b) In § 52.60 (AL), § 52.96 (AK), § 52.144 (AZ), § 52.131 (AR), § 52.270 (CA), § 52.343 (CO), § 52.383 (CT), § 52.432 (DE), § 52.499 (DC), § 52.530 (FL), § 52.632 (HI), § 52.683 (ID), § 52.738 (IL), § 52.793 (IN), § 52.833 (IA), § 52.884 (KS), § 52.931 (KY), § 52.986 (LA), § 52.1116 (MD), § 52.1180 (MI), § 52.1234 (MN), § 52.1280 (MS), § 52.1339 (MO), § 52.1382 (MT), § 52.1436 (NB), § 52.1485 (NV), § 52.1529 (NH), § 52.1603 (NJ), § 52.1634 (NM), § 52.1689 (NY), § 52.1778 (NC), § 52.1884 (OH), § 52.1929 (OK), § 52.1987 (OR), § 52.2058 (PA), § 52.2083 (RI), § 52.2131 (SC), § 52.2178 (SD), § 52.2303 (TX), § 52.2346 (UT), § 52.2451 (VA), § 52.2497 (WA), § 52.2528 (WV), § 52.2581 (WI), § 52.2676 (GU), § 52.2729 (PR), § 52.2779 (VI), and § 52.2827 (AmS), paragraphs (a) and (b) are revised to read as follows:

* * * * *

(a) The requirements of sections 160 through 165 of the Clean Air Act are not met, since the plan does not include approvable procedures for preventing the significant deterioration of air quality.

(b) *Regulations for preventing significant deterioration of air quality.* The provisions of 52.21(b) through (w) are hereby incorporated and made a part of the applicable state plan for the State of ———.

Emission Offset Interpretative Ruling

3. Sections I, II, III and IV of the Emission Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979) and 45 FR 31307 (May 13, 1980), are amended as follows:

A. By adding a new third paragraph to Section I, to read as follows:

I. Introduction

* * * * *

The requirement of this Ruling shall not apply to any major stationary source or major modification that was not subject to the Ruling as in effect on January 16, 1979, if the owner or operator:

A. Obtained all final federal, state, and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

B. Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

C. Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

B. By revising Section II, subsection A, to read as follows:

II. Initial Screening Analyses and Determination of Applicable Requirements.

A. *Definitions*—For the purposes of this Ruling:

1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

2. "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control

of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

3. "Installation" means an identifiable piece of process equipment.

4. "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

5.(i) "Major stationary source" means:

(*a*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act; or

(*b*) Any physical change that would occur at a stationary source not qualifying under paragraph 5.(i)(*a*) as a major stationary source, if the change would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

6.(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

(*b*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 21, 1976, purusant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*2*) The source is approved to use under any permit issued under this ruling;

(*f*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24;

(*g*) Any change in ownership at a stationary source.

7.(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(*a*) The date five years before construction on the particular change commences and

(*b*) The date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in issuing a permit for the source under this Ruling which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(v) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins;

(*c*) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18; and

(*d*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vi) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

8. "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

9. "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 per cent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this Ruling. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

10. "Fixed capital cost" means the capital needed to provide all the depreciable components.

11. "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this Ruling, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

12. "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

13.(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

14. "Allowable emissions" means the emissions rate calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) Applicable standards as set forth in 40 CFR Parts 60 and 61;

(ii) Any applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

15. "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to this Ruling, 40 CFR 52.21, or under regulations approved pursuant to 40 CFR 51.18 or 51.24.

16.(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit as determined in accordance with subparagraphs (ii)-(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

17. "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

18. "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

19. "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

20. "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

21. "Lowest achievable emission rate" means, for any source, the more stringent rate of emissions based on the following:

(i) The most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(ii) The most stringent emissions limitation which is achieved in practice by such class or category of stationary source. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source. In no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

22. "Resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. Energy conversion facilities must utilize solid waste to provide more than 50 percent of the heat input to be considered a resource recovery facility under this Ruling.

C. By amending Section II, subsection C by deleting footnote 2 and the second paragraph. The first paragraph is revised to read as follows:

C. *Review of specified sources for air quality impact.*

In addition, the reviewing authority must determine whether the major stationary source or major modification would be constructed in an area designated in 40 CFR 81.300 *et seq.* as nonattainment for a pollutant for which the stationary source or modification is major.

D. By revising Section II, subsection F to read as follows:

F. *Fugitive emissions sources.* Section IV. A. of this Ruling shall not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(1) Coal cleaning plants (with thermal dryers);

(2) Kraft pulp mills;

(3) Portland cement plants;

(4) Primary zinc smelters;

(5) Iron and steel mills;

(6) Primary aluminum ore reduction plants;

(7) Primary copper smelters;

(8) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(9) Hydrofluoric, sulfuric, or nitric acid plants;

(10) Petroleum refineries;

(11) Lime plants;

(12) Phosphate rock processing plants;

(13) Coke oven batteries;

(14) Sulfur recovery plants;

(15) Carbon black plants (furnace process);

(16) Primary lead smelters;

(17) Fuel conversion plants;

(18) Sintering plants;

(19) Secondary metal production plants;

(20) Chemical process plants;

(21) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(22) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(23) Taconite ore processing plants;

(24) Glass fiber processing plants;

(25) Charcoal production plants;

(26) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(27) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

E. By deleting Footnote 3 of subsection C of Section III and revising the third paragraph as follows:

C. *Review of specified sources of air quality impact.*

* * * * *

For ozone, sources of volatile organic compounds, locating outside a designated ozone nonattainment area, will be presumed to have no significant impact on the designated nonattainment area. If ambient monitoring indicates that the area of source location is in fact nonattainment, then the source may be permitted under the provisions of any state plan adopted pursuant to section 110(a)(2)(D) of the Act until the area is designated nonattainment and a State Implementation Plan revision is approved. If no state plan pursuant to section 110(a)(2)(D) has been adopted and approved, then this Ruling shall apply.

* * * * *

F. By adding a new subsection F. to IV., to read as follows:

IV. Sources That Would Locate in a Designated Nonattainment Area

F. *Source Obligation.*

At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of this Ruling shall apply to the source or modification as though construction had not yet commenced on the source or modification.

State Plans For New Source Review For Nonattainment Purposes.

4. Section 40 CFR 51.18(j) is amended to read as follows:

§ 51.18 Review of new stationary sources modifications.

* * * * *

(j) State Implementation Plan provisions satisfying sections 172(b)(6) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(ii) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(iii) "Installation" means an identifiable piece of process equipment.

(iv) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(v)(*a*) "Major stationary source" means:

(*1*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act; or

(*2*) Any physical change that would occur at a stationary source not qualifying under paragraph (v)(*a*)(*1*) as a major stationary source, if the change would constitute a major stationary source by itself.

(*b*) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

(vi)(*a*) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(*b*) Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

(*c*) A physical change or change in the method of operation shall not include:

(*1*) Routine maintenance, repair and replacement;

(*2*) Use of an alternative fuel or raw material by reason of an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*3*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*4*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*5*) Use of an alternative fuel or raw material by a stationary source which:

(*i*) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*ii*) The source is approved to use under any permit issued under regulations approved pursuant to this section;

(*6*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(*7*) Any change in ownership at a stationary source.

(vii)(*a*) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*1*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*2*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(*b*) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs before the date that the increase from the particular change occurs.

(*c*) An increase or decrease in actual emissions is creditable only if:

(*1*) It occurs within a reasonable period to be specified by the reviewing authority; and

(*2*) The reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section which permit is in effect when the increase in actual emissions from the particular change occurs.

(*d*) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(*e*) A decrease in actual emissions is creditable only to the extent that:

(*1*) The old level of actual emissions or the old level of allowable emissions, whichever, is lower, exceeds the new level of actual emissions;

(*2*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*3*) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18 or the state has not relied on it in demonstrating attainment or reasonable further progress.

(*4*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(*f*) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(viii) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(ix) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

(x) "Fixed capital cost" means the capital needed to provide all the depreciable components.

(xi) "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(*a*) Emissions from ships or trains coming to or from the new or modified stationary source; and

(*b*) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(xii) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(xiii) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

(xiv) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(*a*) The applicable standards set forth in 40 CFR Parts 60 or 61;

(*b*) Any applicable State Implementation Plan emissions limitation including those with a future compliance date; or

(*c*) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(xv)(*a*) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit as determined in accordance with subparagraphs (*b*)-(*d*) below.

(*b*) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(*c*) The reviewing authority may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(*d*) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(xvi) "Lowest achievable emission rate" means, for any source, the more stringent rate of emissions based on the following:

(*a*) The most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(*b*) The most stringent emissions limitation which is achieved in practice by such class or category of stationary source. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source. In no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance.

(xvii) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to this section, 40 CFR 51.18, or 51.24.

(xviii) "Begin actual construction" means in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

(xix) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(*a*) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(*b*) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(xx) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(xxi) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(2) Each plan shall adopt a preconstruction review program to satisfy the requirements of sections 172(b)(6) and 173 of the Act for any area designated nonattainment for any national ambient air quality standard under 40 CFR 81.300 *et seq.* Such a program shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment, if the stationary source or modification would locate anywhere in the designated nonattainment area.

(3)(i) Each plan shall provide that for sources and modifications subject to any preconstruction review program adopted pursuant to this subsection the baseline for determining credit for emissions reductions is the emissions limit under the applicable State Implementation Plan in effect at the time the application to construct is filed, except that the offset baseline shall be the actual emissions of the source from which offset credit is obtained where:

(*a*) The demonstration of reasonable further progress and attainment of ambient air quality standards is based upon the actual emissions of sources located within a designated nonattainment area for which the preconstruction review program was adopted; or

(*b*) The applicable State Implementation Plan does not contain an emissions limitation for that source or source category.

(ii) The plan shall further provide that:

(*a*) Where the emissions limit under the applicable State Implementation

Plan allows greater emissions than the potential to emit of the source, emissions offset credit will be allowed only for control below this potential;

(*b*) For an existing fuel combustion source, credit shall be based on the allowable emissions under the applicable State Implementation Plan for the type of fuel being burned at the time the application to construct is filed. If the existing source commits to switch to a cleaner fuel at some future date, emissions offset credit based on the allowable (or actual) emissions for the fuels involved is not acceptable, unless the permit is conditioned to require the use of a specified alternative control measure which would achieve the same degree of emissions reduction should the source switch back to a dirtier fuel at some later date. The reviewing authority should ensure that adequate long-term supplies of the new fuel are available before granting emissions offset credit for fuel switches;

(*c*) Emissions reductions achieved by shutting down an existing source or permanently curtailing production or operating hours below baseline levels may be credited, provided that the work force to be affected has been notified of the proposed shutdown or curtailment. Source shutdowns and curtailments in production or operating hours occurring prior to the date the new source application is filed generally may not be used for emissions offset credit. However, where an applicant can establish that it shut down or curtailed production after August 7, 1977, or less than one year prior to the date of permit application, whichever is earlier, and the proposed new source is a replacement for the shutdown or curtailment credit for such shutdown or curtailment may be applied to offset emissions from the new source;

(*d*) No emissions credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed in Table 1 of EPA's "Recommended Policy on Control of Volatile Organic Compounds." (42 FR 35314, July 8, 1977);

(*e*) All emission reductions claimed as offset credit shall be federally enforceable;

(*f*) Procedures relating to the permissible location of offsetting emissions shall be followed which are at least as stringent as those set out in 40 CFR Part 51 Appendix S, section IV.D.

(*g*) Credit for an emissions reduction can be claimed to the extent that the reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18 or the state has not relied on it in demonstrating attainment or reasonable further progress.

(4) Each plan may provide that the provisions of this subsection do not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(5) Each plan shall include enforceable procedures to provide that:

(i) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provision of the plan and any other requirements under local, state or federal law.

(ii) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforcement limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirments of regulations approved pursuant to this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

Restrictions on Construction For Nonattainment Areas

5. 40 CFR 52.24 is amended by adding new paragraphs (f), (g), (h) and (i) to read as follows:

§ 52.24 Statutory restriction on new stationary sources.

* * * * *

(f) The following definitions shall apply under this section.

(1) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(2) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the following document, *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(3) "Installation" means an identifiable piece of process equipment.

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5)(i) "Major stationary source" means:

(*a*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act; or (*b*) Any physical change that would occur at a stationary source not qualifying under paragraph (5)(i)(*a*) as a major stationary source, if the change would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile for organic compounds shall be considered major for ozone.

(6)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

(*b*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before July 1, 1979, unless such change would be prohibited under any federally enforceable permit condition which was established after July 1, 1979 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*2*) The source is approved to use under any permit issued under regulations approved pursuant to 40 CFR 51.18;

(*f*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after July 1, 1979 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(*g*) Any change in ownership at a stationary source.

(7)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(*a*) The date five years before construction on the particular change commences and

(*b*) The date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in issuing a permit for the source under regulations approved pursuant to 40 CFR 51.18 which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(v) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that construction on the particular change begins; and

(*c*) The Administrator or reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18 or the State has not relied on it in demonstrating attainment or reasonable further progress.

(*d*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vi) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(8) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(9) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)–(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection.

(10) "Fixed capital cost" means the capital needed to provide all the depreciable components.

(11) "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(12) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(13) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

(14) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards set forth in 40 CFR Parts 60 and 61;

(ii) Any applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(15) "Federally enforceable" means all limitations and conditions which are

enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 and 51.24.

(16)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with subparagraphs (ii)–(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The Administrator may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(17) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification) of an emissions unit which would result in a change in actual emissions.

(18) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(19) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(20) "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

(g) This section shall not apply to a major stationary source or major modification if the source or modification was not subject to 40 CFR Part 51 Appendix S, as in effect on January 16, 1979, and the owner or operator:

(1) Obtained all final federal, state, and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

(2) Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

(3) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

(h) This section shall not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(1) Coal cleaning plants (with thermal dryers);
(2) Kraft pulp mills;
(3) Portland cement plants;
(4) Primary zinc smelters;
(5) Iron and steel mills;
(6) Primary aluminum ore reduction plants;
(7) Primary copper smelters;
(8) Municipal incinerators capable of charging more than 250 tons of refuse per day;
(9) Hydrofluoric, sulfuric, or nitric acid plants;
(10) Petroleum refineries;
(11) Lime plants;
(12) Phosphate rock processing plants;
(13) Coke oven batteries;
(14) Sulfur recovery plants;
(15) Carbon black plants (furnace process);
(16) Primary lead smelters;
(17) Fuel conversion plants;
(18) Sintering plants;
(19) Secondary metal production plants;
(20) Chemical process plants;
(21) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(22) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(23) Taconite ore processing plants;
(24) Glass fiber processing plants;
(25) Charcoal production plants;
(26) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;
(27) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(i) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then:

(1) If the construction moratorium imposed pursuant to this section is still in effect for the nonattainment area in which the source or modification is located, then the permit may not be so revised; or

(2) If the construction moratorium is no longer in effect in that area, then the requirements of 40 CFR 51.18(j) shall apply to the source or modification as though construction had not yet commenced on the source or modification.

Consolidated Permit Regulations

6. 40 CFR Part 124 is amended as follows:

a. 40 CFR 124.3(b) is deleted and reserved as follows:

§ 124.3 Application for a permit.

* * * * *

(b) [Reserved]

* * * * *

§ 124.5 [Amended]

b. 40 CFR 124.5(g)(2) is revised as follows:

* * * * *

(g) * * *

(2) PSD permits may be terminated only by rescission under § 52.21(w) or by automatic expiration under § 52.21(r). Applications for rescission shall be processed under § 52.21(w) and are not subject to this Part.

§ 124.42 [Amended]

c. The first sentence of 40 CFR 124.42(b) is amended by substituting "submitted" for "requested."

[FR Doc. 80-23786 Filed 8-6-80; 8:45 am]

BILLING CODE 6560-01-M

TAB B
CLEAN WATER (NPDES)

CLEAN WATER (NPDES)

Regulations governing the submission of NPDES Permits are contained in Tab M (Environmental Protection Agency Consolidated Permit).

TAB C
COE PERMIT

code of federal regulations

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

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Navigation and Navigable Waters

PART 200 TO END

Revised as of July 1, 1979

owned sites, structures, and objects of historical or archeological significance are preserved, restored and maintained for the inspiration and benefit of the people, and (3) in consultation with the Advisory Council on Historic Preservation, institute procedures to assure that Federal plans and programs contribute to the preservation and enhancement of non-Federally owned sites, structures and objects of historical, architectural or archeological significance. It also established responsibilities of the heads of Federal agencies to:

a. No later than July 1, 1973, locate, inventory, and nominate to the Secretary of the Interior all sites, buildings, districts and objects under their jurisdiction or control that appear to qualify for listing on the National Register of Historic Places.

b. Exercise caution during the interim period to assure that any Federally-owned property that might qualify for nomination is not inadvertently transferred, sold, demolished or substantially altered. Any questionable actions shall be referred to the Secretary of the Interior for an opinion respecting the property's eligibility and where a property is likely to be eligible, the agency head shall reconsider the proposal in light of national environmental and preservation policy. Where, after such reconsideration, the agency head proposes to transfer, sell, demolish or substantially alter the property, he shall not so act until the Advisory Council on Historic Preservation shall have been provided an opportunity to comment on the proposal.

c. Initiate measures to assure that where as a result of Federal action or assistance a property listed on the National Register of Historic Places is to be substantially altered or demolished records shall be made of the property.

d. Initiate procedures to provide for the maintenance of Federally owned and registered sites.

e. Submit procedures to the Secretary of the Interior and the Advisory Council on Historic Preservation no later than January 1, 1972.

f. Cooperate with purchasers and transferees of a property listed on the National Register of Historic Places in the development of viable plans to use such property in a manner compatible with preservation objectives which do not result in an unreasonable economic burden to public or private interests.

APPENDIX B—[RESERVED]

APPENDIX C—WARNING SIGN

U.S. GOVERNMENT PROPERTY

REGISTERED NATIONAL HISTORIC SITE

Whoever willfully excavates, removes, or otherwise causes damage to the National historic resources and property located on these lands shall be subject to prosecution under Sections 641 and 1361 of Title 18, United States Code. Such prosecution may result in a fine of not more than $10,000 or imprisonment for a term not to exceed 10 years, or both. Violators will be prosecuted.

PART 320—GENERAL REGULATORY POLICIES

Sec.

320.1 Purpose and scope.
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AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 42 FR 37133, July 19, 1977, unless otherwise noted.

§ 320.1 Purpose and scope.

(a) *Types of activities regulated.* This regulation and the regulations that follow (33 CFR 321-329) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army permits for various types of activities that occur in waters of the United States or the oceans. This part identifies the various Federal statutes that require Department of the Army permits before these activities can be lawfully undertaken; the related Federal legislation applicable to the review of each activity that requires a Department of the Army permit; and the general policies that are applicable to the review of all activities that require Department of the Army permits. Parts 321-324 address the various types of activities that require Department of the Army permits, including special policies and procedures applicable to those activities, as follows:

(1) Dams or dikes in navigable waters of the United States (Part 321);

(2) All other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (Part 322);

(3) All activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (Part 322);

(4) Construction of fixed structures and artificial islands on the outer continental shelf (Part 322);

(5) All discharges of dredged or fill material into the waters of the United States (Part 323); and

(6) All activities involving the transportation of dredged material for the purpose of dumping it in ocean waters (Part 324).

(b) *Forms of authorization.* Department of the Army permits for the above described activities are issued under various forms of authorization. These include individual permits; letters of permission that are issued following a review of an individual application for a Department of the Army permit; general permits that authorize the performance of a category or categories of activities in a specific geographical region after it is determined that these activities will cause only a minimal individual and cumulative adverse environmental impact; and nationwide permits that authorize the performance of certain specified activities throughout the Nation. The nationwide permits are found in 33 CFR 322.4 and 323.4. If an activity is covered by a general or nationwide permit, an application for a Department of the Army permit does not have to be made. In such cases, a person must only comply with the conditions contained in the general or nationwide permit to satisfy the requirements of law.

(c) *General instructions.* The procedures for processing all letters of permission, individual permits, and general permits are contained in 33 CFR 325. However, before reviewing those procedures, a person desiring to perform any activity that requires a Department of the Army permit is advised to review the general and special policies that relate to the particular activity as outlined in this Part 320 and Parts 321 through 324. The terms "navigable waters of the United States" and "waters of the United States" are used frequently throughout these regulations, and it is important that the reader understand the difference from the outset. "Navigable waters of the United States" are defined in 33 CFR 329. These are the traditional waters where permits are required for work or structures pursuant to sections 9 and 10 of the River and Harbor Act of 1899. "Waters of the United States" are defined in 33 CFR 323.2(a). These waters include more than navigable waters of the United States and are the waters where permits are required for the discharge of dredged or fill material pursuant to section 404 of the Federal Water Pollution Control Act Amendments of 1972.

§ 320.2 Authorities to issue permits.

(a) Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401) (hereinafter referred to as Section 9) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single State, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof, are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act of October 15, 1966 (80 Stat. 941, 49 U.S.C. 1155g(6)(A)). See also 33 CFR Part 321. A Department of the Army authorization is required for the discharge of dredged or fill material into waters of the United States associated with bridges and causeways pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344). See CFR Part 323.

(b) Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403) (hereinafter referred to as section 10) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or the accomplishment of any other work affecting the course, location, condition, or capacity of such waters, is unlawful unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit, general permit, or letter of permission. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by Section 4(f) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333(f)). See also 33 CFR Part 322.

(c) Section 11 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 404) authorizes the Secretary of the Army to establish harbor lines channelward of which no piers, wharves, bulkheads or other works may be extended or deposits made without approval of the Secretary of the Army. By policy stated in 33 CFR 328, effective May 27, 1970, harbor lines are guidelines only for defining the offshore limits of structures and fills insofar as they impact on navigation interests. Permits for work shoreward of those lines must be obtained in accordance with Section 10 and, if applicable, Section 404.

(d) Section 13 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C 407) provides that the Secretary of the Army, whenever the Chief of Engineers determines that anchorage and navigation will not be injured thereby, may permit the discharge of refuse into navigable waters. In the absence of a permit, such discharge of refuse is prohibited. While the prohibition of this section, known as the Refuse Act, is still in effect, the permit authority of the Secretary of the Army has been superseded by the permit authority provided the Administrator, Environmental Protection Agency, and the States under Sections 402 and 405 of the Federal Water Pollution Control Act Amendments of 1972 (92p-500, 86 Stat. 816, 33 U.S.C. 1342 and 1345). See 40 CFR Parts 124 and 125.

(e) Section 14 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1152; 33 U.S.C. 408) provides that the Secretary of the Army on the recommendation of the Chief of Engineers may grant permission for the temporary occupation or use of any seawall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States. This permission will be granted by an appropriate real estate instrument in accordance with existing real estate regulations.

(f) Section 1 of the River and Harbor Act of June 13, 1902 (32 Stat. 371; 33 U.S.C. 565) allows any persons or corporations desiring to improve any navigable river at their own expense and risk to do so upon the approval of the plans and specifications by the Secretary of the Army and the Chief of Engineers. Improvements constructed under this authority, which are primarily in Federal project areas, remain subject to the control and supervision of the Secretary of the Army and the Chief of Engineers.

(g) Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (PL 92-500, 86 Stat. 816, 33 U.S.C. 1344) (hereinafter referred to as Section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites. See 33 CFR 323. The selection and use of disposal sites will be in accordance with guidelines developed by the Administrator of the Environmental Protection Agency (EPA) in conjunction with the Secretary of the Army, published in 40 CFR Part 230.

If these guidelines prohibit the selection or use of a disposal site, the Chief of Engineers may consider the economic impact on navigation of such a prohibition in reaching his decision. Furthermore, the Administrator can prohibit or restrict the use of any defined area as a disposal site whenever he determines, after notice and opportunity for public hearings and after consultation with the Secretary of the Army, that the discharge of such materials into such areas will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.

(h) Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (Pub. L. 92-532, 86 Stat. 1052, 33 U.S.C. 1413) (hereinafter referred to as Section 103) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters where it is determined that the dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological system, or economic potentialities. The selection of disposal sites will be in accordance with criteria, developed by the Administrator of the EPA in consultation with the Secretary of the Army, published in 40 CFR Parts 220-229. However, similar to the EPA Administrator's limiting authority cited in subparagraph (g), above, the Administrator can prevent the issuance of a permit under this authority if he finds that the dumping of the material will result in an unacceptable adverse impact on municipal water supplies, shellfish beds, wildlife, fisheries or recreational areas. See also 33 CFR Part 324.

§ 320.3 Related legislation.

(a) Section 401 of the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. 92-500; 86 Stat. 816, 33 U.S.C. 1341) requires any non-Federal applicant for a Federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the affected waters at the point where the discharge originates or will originate, that the discharge will comply with the applicable effluent limitations and water quality standards. A certification obtained for the construction of any facility must also pertain to the subsequent operation of the facility.

(b) Section 307(c) of the Coastal Zone Management Act of 1972, as amended (Pub. L. 94-370.90 Stat. 1013, 16 U.S.C. 1456(c)) requires Federal Agencies conducting activities, including development projects, directly affecting a State's coastal zone, to comply, to the maximum extent practicable, with an approved State coastal zone management program. It also requires any non-Federal applicant for a Federal License or permit to conduct an activity affecting land or water uses in the State's coastal zone to furnish a certification that the proposed activity will comply with the State's coastal zone management program. Generally, no permit will be issued until the State has concurred with the non-Federal applicant's certification. This provision becomes effective upon approval by the Secretary of Commerce of the State's coastal zone management program. See also 15 CFR Part 930.

(c) Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (Pub. L. 92-532, 86 Stat. 1052, 16 U.S.C. 1432) authorizes the Secretary of Commerce, after consultation with other interested Federal agencies and with the approval of the President, to designate as marine sanctuaries those areas of the ocean waters or of the Great Lakes and their connecting waters or of other coastal waters which he determines necessary for the purpose of preserving or restoring such areas for their conservation, recreational, ecological, or aesthetic values. After designating such an area, the Secretary of Commerce shall issue regulations to control any activities within the area. Activities in the sanctuary authorized under other authorities are valid only if the Secretary of Commerce certifies that the activities are consistent with the purposes of Title III of the Act and can be carried out within the regulations for the sanctuary.

(d) The National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347) declares the national policy to encourage a productive and enjoyable harmony between man and his environment. Section 102 of that Act directs that "to the fullest extent possible: (1) The policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall * * * insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations * * *". See also 33 CFR Part 325 and 33 CFR 209.410.

(e) The Fish and Wildlife Act of 1956 (16 U.S.C. 742a, et seq.) the Migratory Marine Game-Fish Act (16 U.S.C. 760c-760g) and the Fish and Wildlife Coordination Act (16 U.S.C. 661-666c) and other acts express the concern of Congress with the quality of the aquatic environment as it affects the conservation, improvement and enjoyment of fish and wildlife resources. Reorganization Plan No. 4 of 1970 transferred certain functions, including certain fish and wildlife-water resources coordination responsibilities, from the Secretary of the Interior to the Secretary of Commerce. Under the Fish and Wildlife Coordination Act and Reorganization Plan No. 4, any Federal agency that proposes to control or modify any body of water must first consult with the United States Fish and Wildlife Service, the National Marine Fisheries Service, as appropriate, and with the head of the appropriate State agency exercising administration over the wildlife resources of the affected State.

(f) The Federal Power Act of 1920 (41 Stat. 1063; 16 U.S.C. 791a et seq.), as amended, authorizes the Federal Power Commission (FPC) to issue licenses for the construction, operation and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, and other physical structures of a power project. However, where such structures will affect the navigable capacity of any navigable waters of the United States (as defined in 16 U.S.C. 796), the plans for the dam or other physical structures affecting navigation must be approved by the Chief of Engineers and the Secretary of the Army. In such cases, the interests of navigation should normally be protected by a recommendation to the FPC for the inclusion of appropriate provisions in the FPC license rather than the issuance of a separate Department of the Army permit under 33 U.S.C. 401 et seq. As to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the FPC under the Federal Power Act of 1920, as amended, the provisions of 33 U.S.C. 401 et seq. remain fully applicable. In all cases involving the discharge of dredged or fill material into waters of the United States or the transportation of dredged material for the purpose of dumping in ocean waters, Section 404 or Section 103 will be applicable.

(g) The National Historic Preservation Act of 1966 (80 Stat. 915 16, U.S.C. 470) created the Advisory Council on Historic Preservation to advise the President and Congress on matters involving historic preservation. In performing its function the Council is authorized to review and comment upon activities licensed by the Federal Government which will have an effect upon properties listed in the National Register of Historic Places, or eligible for listing. The concern of Congress for the preservation of significant historical sites is also expressed in the Preservation of Historical and Archeological Data Act of 1974 (16 U.S.C. 469 et seq.), which amends the Act of June 27, 1960. By this Act, whenever a Federal construction project or Federally licensed project, activity or program alters any terrain such that significant historical or archeological data is threatened, the Secretary of the Interior may take action necessary to recover and preserve the data prior to the commencement of the project. See also 33 CFR Part 305.

(h) The Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.) prohibits any developer or agent from selling or leasing any lot in a subdivision (as defined in 15 U.S.C. 1701(3)) unless the purchaser is furnished in advance a printed property report containing information which the Secretary of Housing and Urban Development may, by rules or regulations, require for the protection of purchasers. In the event the lot in question is part of a project that requires Department of the Army authorization, the Property Report is required by Housing and Urban Development regulation to state whether or not a permit has been applied for, issued, or denied by the Corps of Engineers for the development under Section 10 or Section 404. The Property Report is also required to state whether or not any enforcement action has been taken as a consequence of non-application for or denial of such permit.

(i) The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) declares the intention of the Congress to conserve threatened and endangered species and the ecosystems on which those species depend. The Act provides that Federal agencies must utilize their authorities in furtherance of its purposes by carrying out programs for the conservation of endangered or threatened species, and by taking such action necessary to insure that any action authorized by that Agency will not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretaries of Interior or Commerce, as appropriate, to be critical. See also 50 CFR Part 17.

(j) The Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.) prohibits the ownership, construction, or operation of a deepwater port beyond the territorial seas without a license issued by the Secretary of Transportation. The Secretary of Transportation may issue such a license to an applicant if he determines, among other things, that the construction and operation of the deepwater port is in the national interest and consistent with national security and other national policy goals and objectives. An application for a deepwater port license constitutes an application for all Federal authorizations required for the ownership, construction, and operation of a deepwater port, including applications for Section 10, Section 404 and Section 103 permits which must also be issued by the Department of the Army pursuant to the authorities listed in § 320.2. The Secretary of Transportation must obtain the views and recommendations of all Federal agencies having jurisdiction over any aspect of the deepwater port construction and operation prior to issuing a license.

(k) The Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.) expresses the intent of Congress that marine mammals be protected and encouraged to develop in order to maintain the health and stability of the marine ecosystem. The Act imposes a perpetual moratorium on the harrassment, hunting, capturing, or killing of marine mammals and on the importation of marine mammals and marine mammal products without a permit from either the Secretary of the Interior or the Secretary of Commerce, depending upon the species of marine mammal involved. Such permits may be issued only for purposes of scientific research and for public display if the purpose is consistent with the policies of the Act. The appropriate Secretary is also empowered in certain restricted circumstances to waive the requirements of the Act:

(l) Section 7(a) of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1278 et seq.) provides that no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. No department or agency of the United States shall recommend authorizing of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration, or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior or the Secretary of Agriculture, as the case may be, in writing of its intention so to do at least sixty days in advance, and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this Act and would affect the component and the values to be protected by it under this Act.

(m) Section 6(f) of the Land and Water Conservation Fund Act of 1965 (78 Stat. 897, 16 U.S.C. 460 *l*-4, *et seq.*) provides that no property acquired or developed with assistance from the Land and Water Conservation Fund shall, without the approval of the Secretary of the Interior, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

§ 320.4 General policies for evaluating permit applications.

The following policies shall be applicable to the review of all applications for Department of the Army permits. Additional policies specifically applicable to certain types of activities are identified in Parts 321-324 of this chapter.

(a) *Public interest review.* (1) The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity and its intended use on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of the general balancing process (e.g., see 33 CFR 209.400, Guidelines for Assessment of Economic, Social and Environmental Effects of Civil Works Projects). That decision should reflect the national concern for both protection and utilization of important resources. All factors which may be relevant to the proposal must be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people. No permit will be granted unless its issuance is found to be in the public interest.

(2) The following general criteria will be considered in the evaluation of every application:

(i) The relative extent of the public and private need for the proposed structure or work;

(ii) The desirability of using appropriate alternative locations and methods to accomplish the objective of the proposed structure or work;

(iii) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work may have on the public and private uses to which the area is suited; and

(iv) The probable impact of each proposal in relation to the cumulative effect created by other existing and anticipated structures or work in the general area.

(b) *Effect on wetlands.* (1) Wetlands are vital areas that constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.

(2) Wetlands considered to perform functions important to the public interest include:

(i) Wetlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species;

(ii) Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges;

(iii) Wetlands, the destruction or alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics;

(iv) Wetlands which are significant in shielding other areas from wave action, erosion, or storm damage. Such wetlands are often associated with barrier beaches, islands, reefs and bars;

(v) Wetlands which serve as valuable storage areas for storm and flood waters;

(vi) Wetlands which are prime natural recharge areas. Prime recharge areas are locations where surface and ground water are directly interconnected; and

(vii) Wetlands through natural water filtration processes serve to purify water.

(3) Although a particular alteration of wetlands may constitute a minor change, the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources. Thus, the particular wetland site for which an application is made will be evaluated with the recognition that it is part of a complete and interrelated wetland area. In addition, the District Engineer may undertake reviews of particular wetland areas in consultation with the appropriate Regional Director of the Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the Regional Administrator of the Environmental Protection Agency, the local representative of the Soil Conservation Service of the Department of Agriculture, and the head of the appropriate State agency to assess the cumulative effect of activities in such areas.

(4) No permit will be granted to work in wetlands identified as important by subparagraph (2), above, unless the District Engineer concludes, on the basis of the analysis required in paragraph (a), above, that the benefits of the proposed alteration outweigh the damage to the wetlands resource and the proposed alteration is necessary to realize those benefits. In evaluating whether a particular alteration is necessary, the District Engineer shall consider whether the proposed activity is primarily dependent on being located in, or in close proximity to the aquatic environment and whether feasible alternative sites are available. The applicant must provide sufficient information on the need to locate the proposed activity in the wetland and must provide data on the basis of which the availability of feasible alternative sites can be evaluated.

(5) In addition to the policies expressed in this subpart the Congressional policy expressed in the Estuary Protection Act, Pub. L. 90-454, and State regulatory laws or programs for classification and protection of wetlands will be given great weight.

(c) *Fish and wildlife.* In accordance with the Fish and Wildlife Coordination Act (§ 320.3(e) above) Corps of Engineers officials will consult with the Regional Director, U.S. Fish and Wildlife Service, the Regional Director, National Marine Fisheries Service, and the head of the agency responsible for fish and wildlife for the state in which the work is to be performed, with a view to the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application. They will give great weight to these views on fish and wildlife considerations in evaluating the application. The applicant will be urged to modify his proposal to eliminate or mitigate any damage to such resources, and in appropriate cases the permit may be conditioned to accomplish this purpose.

(d) *Water quality.* Applications for permits for activities which may affect the quality of a water of the United States will be evaluated for compliance with applicable effluent limitations, water quality standards, and management practices during the construction, operation, and maintenance of the proposed activity. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of Section 401 of the Federal Water Pollution Control Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration. Any permit issued may be conditioned to implement water quality protection measures.

(e) *Historic, scenic, and recreational values.* (1) Applications for permits covered by this regulation may involve areas which possess recognized historic, cultural, scenic, conservation, recreational or similar values. Full evaluation of the general public interest requires that due consideration be given to the effect which the proposed structure or activity may have on the enhancement, preservation, or development of such values. Recognition of those values is often reflected by State, regional, or local land use classifications, or by similar Federal controls or policies. In both cases, action on permit applications should, insofar as possible, be consistent with, and avoid adverse effect on, the values or purposes for which those classifications, controls, or policies were established.

(2) Specific application of the policy in subparagraph (1) above, applies to:

(i) Rivers named in Section 3 of the Wild and Scenic Rivers Act (82 Stat. 906, 16 U.S.C. 1273 et seq.); those proposed for inclusion as provided by Sections 4 and 5 of the Act, or by later legislation; and wild, scenic, and recreational rivers established by State and local entities;

(ii) Historic, cultural, or archeological sites or practices as provided in the National Historic Preservation Act of 1966 (83 Stat. 852, 42 U.S.C. 4321 et seq.) (see also Executive Order 11593, May 13, 1971, and Statutes there cited). Particular attention should be directed toward any district, site, building, structure, or object listed or eligible for listing in the National Register of Historic Places;

(iii) Sites included in or determined eligible for listing in the National Registry of Natural Landmarks which are published periodically in the Federal Register;

(iv) Sites acquired or developed with the assistance of the Land and Water Conservation Fund (78 Stat. 897, 16 U.S.C. 460, 1-4, et seq.) or the Recreational Demonstrations Projects Act of 1942 (Pub. L. 77-594, 56 Stat. 326) and other public parks and recreation areas; and

(v) Any other areas named in Acts of Congress or Presidential Proclamations as National Rivers, National Wilderness Areas, National Seashores, National Recreation Areas, National Lakeshores, National Parks, National Monuments, and such areas as may be established under Federal law for similar and related purposes, such as estuarine and marine sanctuaries.

(f) *Effect on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or base line from which the three mile belt is measured for purposes of the Submerged Lands Act and International Law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there are exceptions where there are islands or lowtide elevations offshore. (The Submerged Lands Act, 67 Stat. 29, U.S. Code Section 1301(c), and United States vs. California, 381 U.S. 139 1965), 382 U.S. 448 (1966).) All applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or base line might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The District Engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, D.C. 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the file of the application. After completion of standard processing procedures, the file will be forwarded to the Chief of Engineers. The decision on the application will be made by the Secretary of the Army after coordination with the Attorney General.

(g) *Interference with adjacent properties or water resource projects.* Authorization of work or structures by the Department of the Army does not convey a property right, nor authorize any injury to property or invasion of other rights.

(1) Because a landowner has the general right to protect his property from erosion, applications to erect protective structures will usually receive favorable consideration. However, if the protective structure may cause damage to the property of others, the District Engineer will so advise the applicant and inform him of possible alternative methods of protecting his property. Such advice will be given in terms of general guidance only so as not to compete with private engineering firms nor require undue use of government resources. A significant probability of resulting damage to nearby properties can be a basis for denial of an application.

(2) A landowner's general right of access to navigable waters of the United States is subject to the similar rights of access held by nearby landowners and to the general public's right of navigation on the water surface. Proposals which create undue interference with access to, or use of, navigable waters will generally not receive favorable consideration.

(3) Where it is found that the work for which a permit is desired is in navigable waters of the United States (see 33 CFR Part 329) and may interfere with an authorized Federal project, the applicant should be apprised in writing of the fact and of the possibility that a Federal project which may be constructed in the vicinity of the proposed work might necessitate its removal or reconstruction. The applicant should also be informed that the United States will in no case be liable for any damage or injury to the structures or work authorized by Sections 9 or 10 of the River and Harbor Act of 1899 (see 33 CFR Parts 321 and 322) which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claims or right to compensation will accrue from any such damage.

(4) Proposed activities which are in the area of a Federal project which exists or is under construction will be evaluated to insure that they are compatible with the purposes of the project.

(h) *Activities affecting coastal zones.* Applications for Department of the Army permits for activities affecting the coastal zones of those States having a coastal zone management program approved by the Secretary of Commerce will be evaluated with respect to compliance with that program. No permit will be issued to a non-Federal applicant until certification has been provided that the proposed activity complies with the coastal zone management program and the appropriate State agency has concurred with the certification or has waived its right to do so. however, a permit may be issued to a non-Federal applicant if the Secretary of Commerce, on his own initiative or upon appeal by the applicant, finds that the proposed activity is consistent with the objectives of the Coastal Zone Management Act of 1972 or is otherwise necessary in the interest of national security. Federal agency applicants for Department of the Army permits are responsible for complying with the Coastal Zone Management Act's directives for assuring that their activities directly affecting the coastal zone are consistent, to the maximum extent practicable, with approved State coastal zone management programs.

(i) *Activities in marine sanctuaries.* Applications for Department of the Army authorization for activities in a marine sanctuary established by the Secretary of Commerce under authority of Section 302 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, will be evaluated for impact on the marine sanctuary. No permit will be issued until the applicant provides a certification from the Secretary of Commerce that the proposed activity is consistent with the purposes of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and can be carried out within the regulations promulgated by the Secretary of Commerce to control activities within the marine sanctuary. Authorizations so issued will contain such special conditions as may be required by the Secretary of Commerce in connection with his certification.

(j) *Other Federal, state, or local requirements.* (1) Processing of an application for a Department of the Army permit normally will proceed concurrently with the processing of other required Federal, State, and/or local authorizations or certification. Where the required Federal, State and/or local certification and/or authorization has been denied, the application for a Department of the Army permit will be denied without prejudice to the right of the applicant to reinstate processing of his application if subsequent approval is received from the appropriate Federal, State and/or local agency. Even if official certification and/or authorization is not required by State or Federal law, but a State, regional, or local agency having jurisdiction or interest over the particular activity comments on the application, due consideration shall be given to those official views as a reflection of local factors of the public interest.

(2) Where officially adopted State, regional, or local land-use classifications, determinations, or policies are applicable to the land or water areas under consideration, they shall be presumed to reflect local factors of the public interest and shall be considered in addition with the other national factors of the public interest identified in § 320.4(a).

(3) A proposed activity may result in conflicting comments from several agencies within the same State. While many States have designated a single State agency or individual to provide a single and coordinated State position regarding pending permit applications, where a State has not so designated a single source, District Engineers will elicit from the Governor an expression of his views and desires concerning the application or, in the alternative, an expression from the Governor as to which State agency represents the official State position in this particular case.

(4) In the absence of overriding national factors of the public interest that may be revealed during the processing of the permit application, a permit will generally be issued following receipt of a favorable State determination provided the concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320-324, and the following statutes have been followed and considered: The National Environmental Policy Act; the Fish and Wildlife Coordination Act; the Historical and Archaeological Preservation Act; the National Historic Preservation Act; the Endangered Species Act; the Coastal Zone Management Act; the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the Federal Water Pollution Control Act (see § 320.3, above).

(5) If the responsible Federal, State, and/or local agency fails to take definitive action to grant or deny required authorizations or to furnish comments as provided in subparagraph (3) above, within three months of the issuance of the public notice, the District Engineer shall process the application to a conclusion.

(6) Permits will not be issued where certification or authorization of the proposed work is required by Federal, State and/or local law and that certification or authorization has been denied.

(7) The District Engineer may, in those States with ongoing permit programs for activities regulated by Department of the Army permits, enter into an agreement with the States to jointly process and evaluate Department of the Army and State permit applications. This may include the issuance of joint public notices; the conduct of joint public hearings, if held; and the joint review and analysis of information and comments developed in

response to the public notice, public hearing, the environmental assessment and the environmental impact statement (if necessary), the Fish and Wildlife Coordination Act, the Historical and Archaeological Preservation Act, the National Historic Preservation Act, the Endangered Species Act, the Coastal Zone Management Act, the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and the Federal Water Pollution Control Act. In such cases, applications for Department of the Army permits may be processed concurrently with the processing of the State permit to an independent conclusion and decision by the District Engineer and appropriate State agency.

(k) *Safety of impoundment structures.* Unless an adequate inspection program is required by another Federal licensing agency or will be performed by another Federal agency, the District Engineer will condition permits for impoundment structures to require that the permittee operate and maintain the structure properly to insure public safety. The District Engineer may condition such permits to require periodic inspections and to indicate that failure to accomplish actions to assure the public safety will be considered cause to revoke the permit.

(l) *Floodplains.* Executive Order 11988, dated May 24, 1977 requires each Federal agency, in its conduct of Federal programs that affect land use including the regulation of water resources, to take action to reduce the risk of flood loss; to minimize the impact of floods on human safety, health and welfare; and to restore and preserve the natural and beneficial values served by floodplains. In evaluating whether activities located in a floodplain that require Department of the Army permits are in the public interest, available alternatives to avoid adverse effects from and incompatible development in floodplains shall be considered.

PART 321—PERMITS FOR DAMS AND DIKES IN NAVIGABLE WATERS OF THE UNITED STATES

Sec.

321.1 General.
321.2 Definitions
321.3 Special policies and procedures.

AUTHORITY: 33 U.S.C. 401.

SOURCE: 42 FR 37138, July 19, 1977, unless otherwise noted.

§ 321.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize the construction of a dike or dam in a navigable water of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401). See 33 CFR 320.2(a). Dams and dikes in navigable waters of the United States also require Department of the Army permits under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344). Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 323 to satisfy the requirements of Section 404.

§ 321.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast), and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR Part 329 for a more complete definition of this term.

(b) The term "dam" means an impoundment structure that completely spans a navigable water of the United States and that may obstruct interstate waterborne commerce.

(c) The term "dike" means an embankment, low dividing wall, or other protective barrier that completely spans a navigable water of the United States and that may obstruct interstate water-borne commerce.

§ 21.3 Special policies and procedures.

The following additional special policies and procedures shall be applicable to the evaluation of permit applications under this regulation:

(a) The Secretary of the Army will decide whether Department of the Army authorization for a dam or dike in a navigable water of the United States will be issued, since this authority has not been delegated to the Chief of Engineers. The conditions to be imposed in any instrument of authorization will be recommended by the District Engineer when he forwards his report to the Secretary of the Army, through the Chief of Engineers, pursuant to 33 CFR 325.11.

(b) A Department of the Army application under Section 9 will not be processed until the approval of the United States Congress has been obtained if the navigable water of the United States is an interstate waterbody, or until the approval of the appropriate State legislature has been obtained if the navigable water of the United States is solely within the boundaries of one State.

PART 322—PERMITS FOR STRUCTURES OR WORK IN OR AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

Sec.

322.1 General.
322.2 Definitions.
322.3 Activities requiring permits.
322.4 Structures and work permitted by this regulation.
322.5 Special policies and procedures.
Appendix A—U.S. Coast Guard/Chief of Engineers Memorandum of Agreement.
Appendix B—Delegation of Authority.

AUTHORITY: 33 U.S.C. 403.

SOURCE: 42 FR 37139, July 19, 1977, unless otherwise noted.

§ 322.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325 those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of Army permits to authorize structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403) (hereinafter referred to as Section 10). See 33 CFR 320.2(b). Certain structures or work in or affecting navigable waters of the United States are also regulated under other authorities of the Department of the Army. These include discharges of dredged or fill material into waters of the United States, including the territorial seas, pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344; see 33 CFR part 323) and the transportation of dredged material by vessel for purposes of dumping in ocean waters, including the territorial seas, pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413, see 33 CFR part 324). A Department of the Army permit will also be required under these additional authorities if they are applicable to structures or work in or affecting navigable waters of the United States. Applicants for Department of the Army permits under this part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 322.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast), and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. See 33 CFR part 329 for a more complete definition of this term.

(b) The term "structure" shall include, without limitation, any pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, jetty, permanent mooring structure, power transmission lines, permanently moored floating vessels, piling, aids to navigation, or any other permanent or semi-permanent obstacle or obstruction.

(c) The term "work" shall include, without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.

(d) The term "letter of permission" means an individual permit issued in accordance with the abbreviated procedures of 33 CFR 325.5(b).

(e) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific structure or work in accordance with the procedures of this regulation and 33 CFR part 325 and a determination that the proposed structure or work is in the public interest pursuant to 33 CFR part 320.

(f) The term "general permit" means a Department of the Army authorization that is issued for a category or categories of structures or work in a specified region of the country, when those structures or work are substantially similar in nature and cause only minimal individual and cumulative adverse environmental impact. A general permit is issued following an evaluation of the proposed category of activities that it will authorize in accordance with the procedures of this regulation (322.5(b)), 33 CFR Part 325, and a determination that the proposed discharges will be in the public interest pursuant to 33 CFR part 320.

(g) The term "nationwide permit" means a Department of the Army authorization that has been issued by this regulation in § 322.4 to permit certain structures or work in or affecting navigable waters of the United States throughout the Nation.

§ 322.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required under Section 10 for all structures or work in or affecting navigable waters of the United States except for bridges and causeways (see Appendix A) and structures or work licensed under the Federal Power Act of 1920. Activities that were commenced or completed shoreward of established Federal harbor lines before May 27, 1970 (see 33 CFR part 328) also do not require Section 10 permits; However, if those activities involve the discharge of dredged or fill material into waters of the United States after October 18, 1972, a Section 404 permit is required (see 33 CFR Part 323).

(1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR Part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) above, if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody. For purposes of a Section 10 permit, a tunnel or other structure under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

(2) Pursuant to Section 154 of the Water Resource Development Act of 1976 (Pub. L. 94-587), Department of the Army permits will not be required under Section 10 to construct wharves and piers in any waterbody, located entirely within one State, that is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce. Section 154 applies only to the construction of a single pier or wharf and not to marinas. Furthermore, Section 154 is not applicable to any pier or wharf that would cause an unacceptable impact on navigation.

(b) *Outer continental shelf.* Department of the Army permits will also be required for the construction of artificial islands and fixed structures on the outer continental shelf pursuant to Section 4(f) of the Outer Continental Shelf Lands Act (see 33 CFR 320.2(b)).

(c) *Activities of Federal agencies.* Except as specifically provided in this subparagraph, activities of the type described in (a) and (b), above, done by or on behalf of any Federal agency, other than any work or structures in or affecting navigable waters of the United States that are part of the Civil Works activities of the Corps of Engineers, are subject to the authorization procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under this regulation. Division and District Engineers will therefore advise Federal agencies accordingly, and cooperate to the fullest extent in expediting the processing of their applications.

(1) Congress has delegated to the Secretary of the Army and the Chief of Engineers in Section 10 the duty to authorize or prohibit certain work or structures in navigable waters of the United States. The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of Section 10. If an agency asserts that it has Congressional authorization meeting the test of Section 10 or would otherwise be exempt from the provisions of Section 10, the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters of the United States or that Congress intended to exempt that agency from the requirements of Section 10. Very often such legislation reserves final approval of plans or construction for the Chief of Engineers. In such cases evaluation and authorization under this regulation are limited by the intent of the statutory language involved.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to State or local certifications and/or authorizations, do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy.

§ 322.4 Structures and work permitted by this regulation.

The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits:

(a) The placement of aids to navigation by the U.S. Coast Guard; see § 322.5(e), below;

(b) Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized; see § 322.5(G), below;

(c) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure or of any currently serviceable structure constructed prior to the requirement for authorization; provided such repair, rehabilitation, or replacement does not result in a deviation from the plans of the original structure, and further provided that the structure to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction;

(d) Marine life harvesting devices such as pound nets, crab traps, eel pots, lobster traps, provided there is no interference with navigation;

(e) Staff gages, tide gages, water recording devices, water quality testing and improvement devices, and similar scientific structures provided there is no interference with navigation;

(f) Survey activities including core sampling; and

(g) Structures or work completed before 18 December 1968 or in waterbodies over which the District Engineer has not asserted jurisdiction provided there is no interference with navigation.

§ 322.5 Special policies.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 10 permits. (See Appendix B.) The following additional special policies and procedures shall also be applicable to the evaluation of permit applications under this regulation.

(a) *General.* Department of the Army permits will be required for structures or work in or affecting navigable waters of the United States. Certain structures or work specified in § 322.4 are permitted by this regulation. If a structure or work is not permitted by this regulation, an individual or general Section 10 permit will be required.

(b) *General Permits.* The District Engineer may, after compliance with the other procedures of 33 CFR Part 325, issue general permits for certain clearly described categories of structures or work, requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories will not require individual permit processing by the procedures of 33 CFR Part 325 unless the District Engineer determines, on a case-by-case basis, that the public interest requires such individual review.

(1) District Engineers will include only those activities that are substantially similar in nature, that cause only minimal adverse environmental impact when performed separately, and that will have only a minimal adverse cumulative effect on the environment as categories which are candidates for general permits.

(2) In addition to the conditions prescribed in Appendix C of 33 CFR Part 325, any general permit issued by the District Engineer shall prescribe the following conditions:

(i) The maximum quantity of material that may be discharged and the maximum area that may be modified by structures or work that are authorized for a single or incidental operation (if applicable);

(ii) A description of the category or categories of activities included in the general permit; and

(iii) The type of water(s) into which the activity may occur.

(3) The District Engineer may require reporting procedures.

(4) A general permit may be revoked if it is determined that the cumulative effects of the activities authorized by it will have an adverse impact on the public interest provided the procedures of 33 CFR 325.7 are followed. Following revocation, applications for any future activities in areas covered by the general permit shall be processed as applications for individual permits.

(c) *Non-Federal dredging for navigation.* (1) The benefits which an authorized Federal navigation project are intended to produce will often require similar and related operations by non-Federal agencies (e.g., dredging an access channel to dock and berthing facilities or deepening such a channel to correspond to the Federal project depth). These non-Federal activities will be considered by Corps of Engineers officials in planning the construction and maintenance of Federal navigation projects and, to the maximum practical extent, will be coordinated with interested Federal, State, regional and local agencies and the general public simultaneously with the associated Federal projects. Non-Federal activities which are not so coordinated will be individually evaluated in accordance with this regulation. In evaluating the public interest in connection with applications for permits for such coordinated operations, equal treatment will, therefore, be accorded to the fullest extent possible to both Federal and non-Federal operations. Furthermore, permits for non-Federal dredging operations, will contain conditions requiring the permittee to comply with the same practices or requirements utilized in connection with related Federal dredging operations with respect to such matters as turbidity, water quality, containment of material, nature and location of approved spoil disposal areas (non-Federal use of Federal contained, disposal areas will be in accordance with laws authorizing such areas and regulations governing their use), extent and period of dredging, and other factors relating to protection of environmental and ecological values.

(2) A permit for the dredging of a channel, slip, or other such project for navigation will also authorize the periodic maintenance dredging of the project. Authority for maintenance dredging will be subject to revalidation at regular intervals to be specified in the permit. Revalidation will be in accordance with the procedures prescribed in 33 CFR 325.6. The permit, however,

will require the permittee to give advance notice to the District Engineer each time maintenance dredging is to be performed. Where the maintenance dredging involves the discharge of dredged material into waters of the United States or the transportation of dredged material for the purpose of dumping in the ocean waters, the procedures in 33 CFR Parts 323 and 324 respectively shall also be followed.

(d) *Structures for small boats.* As a matter of policy, in the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats. Particular attention will be given to the location and general design of such structures to prevent possible obstructions to navigation with respect to both the public's use of the waterway and the neighboring proprietors' access to the waterway. Obstructions can result from both the existence of the structure, particularly in conjunction with other similar facilities in the immediate vicinity, and from its inability to withstand wave action or other forces which can be expected. District Engineers will inform applicants of the hazards involved and encourage safety in location, design and operation. Corps of Engineers officials will also encourage cooperative or group use facilities in lieu of individual proprietor use facilities.

(1) Letters transmitting permits for structures for small boats will, where applicable, include the following language: "Notice is hereby given that a possibility exists that the structure permitted may be subject to damage by wave wash from passing vessels. Your attention is invited to special condition————of the permit." The appropriate designation of the permit condition placing responsibility on the permittee and not on the United States for integrity of the structure and safety of boats moored thereto will be inserted.

(2) Floating structures for small recreational boats or other recreational purposes in lakes controlled by the Corps of Engineers under a Resources Manager are normally subject to permit authorities cited in § 322.3, above, when those waters are regarded as navigable waters of the United States. However, such structures will not be authorized under this regulation but will be regulated under applicable regulations of the Chief of Engineers published in 36 CFR 327.19 if the land surrounding those lakes is under complete Federal ownership. District Engineers will delineate those portions of the navigable waters of the United States where this provision is applicable and post notices of this designation in the vicinity of the lake Resources Manager's office.

(e) *Aids to navigation.* The placing of fixed and floating aids to navigation in a navigable water of the United States is within the purview of Section 10 of the River and Harbor Act of 1899. Furthermore, these aids are of particular interest to the U.S. Coast Guard because of their control of marking, lighting and standardization of such navigation aids. Applications for permits for installation of aids to navigation will, therefore, be coordinated with the appropriate District Commander, U.S. Coast Guard, and permits for such aids will include a condition to the effect that the permittee will conform to the requirements of the Coast Guard for marking, lighting, etc. Since most fixed and floating aids to navigation will not ordinarily significantly affect environmental values, the usual form of authorization to be used will be a letter of permission (See 33 CFR 325.1(b)).

(f) *Outer continental shelf.* Artificial islands and fixed structures located on the outer continental shelf are subject to the standard permit procedures of this regulation. Where the islands or structures are to be constructed on lands which are under mineral lease from the Bureau of Land Management, Department of the Interior, that agency, in cooperation with other Federal agencies, fully evaluates the potential effect of the leasing program on the total environment. Accordingly, the decision whether to issue a permit on lands which are under mineral lease from the Department of the Interior will be limited to an evaluation of the impact of the proposed work on navigation and national security. The public notice will so identify the criteria.

(g) *Canals and other artificial waterways connected to navigable waters of the United States.* (1) A canal or similar artificial waterway is subject to the regulatory authorities discussed in § 322.3, above, if it constitutes a navigable water of the United States, or if it is connected to navigable waters of the United States in a manner which affects their course, condition, or capacity. In all cases the connection to navigable waters of the United States requires a permit. Where the canal itself constitutes a navigable water of the United States, evaluation of the permit application and further exercise of regulatory authority will be in accordance with the standard procedures of this regulation. For all other canals the exercise of regulatory authority is restricted to those activities which affect the course, condition, or capacity of the navigable waters of the United States. Examples of the latter may include the length and depth of the canal; the currents, circulation, quality and turbidity of its waters, especially as they affect fish and wildlife values; and modifications or extensions of its configuration.

(2) The proponent of canal work should submit his application for a permit, including a proposed plan of the entire development, and the location and description of anticipated docks, piers and other similar structures which will be placed in the canal, to the District Engineer before commencing any form of work. If the connection to navigable waters of the United States has already been made without a permit, the District Engineer will proceed in accordance with 33 CFR Part 326. Where a canal connection is planned, an application for a Section 10 permit should be made at the earliest stage of planning. Where the canal construction has already begun, the District Engineer will, in writing, advise the proponent of the need for a permit to connect the canals to navigable waters of the United States. He will also ask the proponent if he intends to make such a connection and will request the immediate submission of the plans and permit application if it is so intended. The District Engineer will also advise the proponent that any work is done at the risk that, if a permit is required, it may not be issued, and that the existence of partially completed excavation work will not be allowed to weigh favorably in evaluation of the permit application.

(h) *Facilities at the borders of the United States.* (1) The construction, operation, maintenance, or connection of facilities at the borders of the United States are subject to Executive control and must be authorized by the President, Secretary of State, or other delegated official.

(2) Applications for permits for the construction, operation, maintenance, or connection at the borders of the United States of facilities for the transmission of electric energy between the United States and a foreign country, or for the exportation or importation of natural gas to or from a foreign country, must be made to the Federal Power Commission. (Executive Order 10485, September 3, 1953, 16 U.S.C. 824(a)(E), 15 U.S.C. 717(b), and 18 CFR Parts 32 and 153).

(3) Applications for the landing or operation of submarine cables must be made to the Federal Communications Commission. (Executive Order 10530, May 10, 1954, 47 U.S.C. 34 to 39, and 47 CFR 1.766).

(4) The Secretary of State is to receive applications for permits for the construction, connection, operation, or maintenance, at the borders of the United States, of pipelines, conveyor belts, and similar facilities for the exportation or importation of petroleum products, coals, minerals, or other products to or from a foreign country; facilities for the exportation or importation of water or sewage to or from a foreign country; and monorails, aerial cable cars, aerial tramways and similar facilities for the transportation of persons or things, or both, to or from a foreign country. (Executive Order 11423, August 16, 1968.)

(5) A Department of the Army permit under Section 10 of the River and Harbor Act of 1899 is also re-

quired for all of the above facilities which affect the navigable waters of the United States, but in each case in which a permit has been issued as provided above, the decision whether to issue the Department of the Army permit will be based primarily on factors of navigation, since the basic existence and operation of the facility will have been examined and permitted as provided by the Executive orders. Furthermore, in those cases where the construction, maintenance, or operation at the above facilities involves the discharge of dredged or fill material in waters of the United States or the transportation of dredged material for the purpose of dumping it into ocean waters, appropriate Department of the Army authorizations under Section 404 of the Federal Water Pollution Control Act or under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, are also required (See 33 CFR Parts 323, 324).

(i) *Power transmission lines.* (1) Permits under Section 10 of the River and Harbor Act of 1899 are required for power transmission lines crossing navigable waters of the United States unless those lines are part of a water power project subject to the regulatory authorities of the Federal Power Commission under the Federal Water Power Act of 1920. If an application is received for a permit for lines which are part of a water power project, the applicant will be instructed to submit his application to the Federal Power Commission. If the lines are not part of a water power project, the application will be processed in accordance with the procedures prescribed in this regulation.

(2) The following minimum clearances are required for aerial electric power transmission lines crossing navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges, or the clearances which would be required by the U.S. Coast Guard for new fixed bridges, in the vicinity of the proposed power line crossing. The clearances are based on the low point of the line under conditions which produce the greatest sag, taking into consideration temperature, load, wind, length or span, and type of supports as outlined in the National Electrical Safety Code.

Minimum additional clearance above clearance required for bridges

Nominal system voltage kilovolt	*Feet*[1]
115 and below	20
138	22
161	24
230	26
350	30
500	35
700	42
750 to 765	45

[1] Above clearance required for bridges.

(3) Clearances for communication lines, stream gaging cables, ferry cables, and other aerial crossings are usually required to be a minimum of ten feet above clearances required for bridges. Greater clearances will be required if the public interest so indicates.

(j) *Seaplane operations.* (1) Structures in navigable waters of the United States associated with seaplane operations require Department of the Army permits, but close coordination with the Federal Aviation Administration (FAA), Department of Transportation, is required on such applications.

(2) The FAA must be notified by an applicant whenever he proposes to establish or operate a seaplane base. The FAA will study the proposal and advise the applicant, District Engineer, and other interested parties as to the effects of the proposal on the use of airspace. The District Engineer will therefore refer any objections regarding the effect of the proposal on the use of airspace to the FAA, and give due consideration to their recommendations when evaluating the general public interest.

(3) If the seaplane base will serve air carriers licensed by the Civil Aeronautics Board, the applicant must receive an airport operating certificate from the FAA. That certificate reflects determination and conditions relating to the installation operation, and maintenance of adequate air navigation facilities and safety equipment. Accordingly, the District Engineer may, in evaluating the general public interest, con-

sider such matters to have been primarily evaluated by the FAA.

(k) *Foreign Trade Zones.* The Foreign Trade Zones Act (48 Stat. 998-1003, 19 U.S.C. 81a to 81u, as amended) authorizes the establishment of foreign-trade zones in or adjacent to United States ports of entry under terms of a grant and regulations prescribed by the Foreign-Trade Zones Board. Pertinent regulations are published in 15 CFR Part 400. The Secretary of the Army is a member of the Board, and construction of a zone is under the supervision of the District Engineer. Laws governing the navigable waters of the United States remain applicable to foreign-trade zones, including the general requirements of this regulation. Evaluation by a District Engineer of a permit application may give recognition to the consideration by the Board of the general economic effects of the zone on local and foreign commerce, general location of wharves and facilities, and other factors pertinent to construction, operation, and maintenance of the zone.

APPENDIX A—U.S. COAST GUARD/CHIEF OF ENGINEERS, MEMORANDUM OF AGREEMENT

1. PURPOSE AND AUTHORITY

A. The Department of Transportation Act, the Act of October 15, 1966, P.L. 89-670, transferred to and vested in the Secretary of Transportation certain functions, powers and duties previously vested in the Secretary of the Army and the Chief of Engineers. By delegation of authority from the Secretary of Transportation (49 CFR 1.46(c)) the Commandant, U.S. Coast Guard, has been authorized to exercise certain of these functions, powers and duties relating to bridges and causeways conferred by:

(1) The following provision of law relating generally to drawbridge operating regulations: Section 5 of the Act of August 18, 1894, as amended (28 Stat. 362; 33 U.S.C. 499);

(2) The following law relating generally to obstructive bridges: The Act of June 21, 1940, as amended (The Truman-Hobbs Act) (54 Stat. 497; 33 U.S.C. 511 et seq.);

(3) The following laws and provisions of law to the extent that they relate generally to the location and clearances of bridges and causeways in the navigable waters of the United States:

(a) Section 9 of the Act of March 3, 1899, as amended (30 Stat. 1151; 33 U.S.C. 401);

(b) The Act of March 23, 1906, as amended (34 Stat. 84; 33 U.S.C. 491 et seq.); and

(c) The General Bridge Act of 1946, as amended (60 Stat. 847; 33 U.S.C. 525 et seq.) except Sections 502(c) and 503.

B. The Secretary of the Army and The Chief of Engineers continue to be vested with broad and important authorities and responsibilities with respect to navigable waters of the United States, including, but not limited to, jurisdiction over excavation and filling, design flood flows and construction of certain structures in such waters, and the prosecution of waterway improvement projects.

C. The purposes of this agreement are:

(1) To recognize the common and mutual interest of the Chief and Engineers and the Commandant, U.S. Coast Guard, in the orderly and efficient administration of their respective responsibilities under certain Federal statutes to regulate certain activities in navigable waters of the United States:

(2) To clarify the areas of jurisdiction and the responsibilities of the Corps of Engineers and the Coast Guard with respect to:

(a) The alteration of bridges,

(1) In connection with Corps of Engineers waterway improvement projects, and

(2) Under the Truman-Hobbs Act;

(b) The construction, operation and maintenance of bridges and causeways as distinguished from other types of structures over or in navigable waters of the United States;

(c) The closure of waterways and the restriction of passage through or under bridges in connection with their construction, operation, maintenance and removal; and

(d) The selection of an appropriate design flood flow for flood hazard analysis of any proposed water opening.

(3) To provide for coordination and consultation on projects and activities in or affecting the navigable waters of the United States.

In furtherance of the above purposes the undersigned do agree upon the definitions, policies and procedures set forth below.

2. ALTERATION OF BRIDGES IN OR ACROSS NAVIGABLE WATERS WITHIN CORPS OF ENGINEERS PROJECTS

A. The Chief of Engineers agrees to advise and consult with the Commandant on navigation projects contemplated by the Corps of Engineers which require the alteration of bridges across the waterways involved in such projects. The Chief of Engineers also agrees to include in such project proposals the costs of alterations, exclusive of betterments, of all bridges within the limits of the designated project which after consultation with the Commandant he determines to require alteration to meet the needs of existing and prospective navigation. Under this concept the federal costs would be furnished under the project.

B. The Commandant of the Coast Guard agrees to undertake all actions and assumes all responsibilities essential to the determination of navigational requirements for horizontal and vertical clearances of bridges across navigable waters necessary in connection with any navigation project by the Chief of Engineers. Further, the Commandant agrees to conduct all public proceedings necessary thereto and establish guide clearance criteria where needed for the project objectives.

3. ALTERATION OF BRIDGES UNDER THE TRUMAN HOBBS ACT

The Commandant of the Coast Guard acknowledges and affirms the responsibility of the Coast Guard, under the Truman-Hobbs Act, to program and fund for the alteration of bridges which, as distinct from project related alterations described in paragraph 2 herein, become unreasonable obstructions to navigation as a result of factors or changes in the character of navigation and this agreement shall in no way affect, impair or modify the powers or duties conferred by that Act.

4. APPROVAL, ALTERATION AND REMOVAL OF OTHER BRIDGES AND CAUSEWAYS

A. *General Definitions.* For purposes of this Agreement and the administration of the statutes cited in 1.A.(3) above, a "bridge" is any structure over, on or in the navigable waters of the United States which (1) is used for the passage or conveyance of persons, vehicles, commodities and other physical matter and (2) is constructed in such a manner that either the horizontal or vertical clearance, or both, may affect the passage of vessels or boats through or under the structure. This definition includes, but is not limited to, highway bridges, railroad bridges, foot bridges, aqueducts, aerial tramways and conveyors, overhead pipelines and similar structures of like function together with their approaches, fenders, pier protection systems, appurtenances and foundations. This definition does not include aerial power transmission lines, tunnels, submerged pipelines, and cables, dams, dikes, dredging and filling in, wharves, piers, breakwaters, bulkheads, jetties and similar structures and works (except as they may be integral features of a bridge and used in its construction, maintenance, operation or removal; or except when they are affixed to the bridge and will have an effect on the clearances provided by the bridge) over which jurisdiction remains with the Department of the Army and the Corps of Engineers under Sections 9 and 10 of the Act of March 3, 1899, as amended (33 U.S.C 401 and 403). A "causeway" is a raised road across water or marshy land, with the water or marshy land on both sides of the road, and which is constructed in or affects navigation, navigable waters and design flood flows.

B. *Combined Structures and Appurtenances.* For purposes of the Acts cited in 1.A.(3) above, a structure serving more than one purpose and having characteristics of either a bridge or causeway, as defined in 4.A., and some other structure, shall be considered as a bridge or causeway when the structure in its entirety, including its appurtenances and incidential features, has or retains the predominant characteristics and purpose of a bridge or causeway. A structure shall not be considered a bridge or causeway when its primary and predominant characteristics and purpose are other than those set forth above and it meets the general definitions above only in a narrow technical sense as a result of incidental features. This interpretation is intended to minimize the number of instances which will require an applicant for a single project to secure a permit or series of permits from both the Department of Transportation and the Department of the Army for each separate feature or detail of the project when it serves, incidentally to its primary purpose, more than one purpose and has features of either a bridge or causeway and features of some other structure. However, if parts of the project are separable and can be fairly and reasonably characterized or classified in an engineering sense as separate structures, each such structure will be so treated and considered for approval by the agency having jurisdiction thereover.

C. *Alteration of the Character of Bridges and Causeways.* The jurisdiction of the Secretary of Transporation and the Coast Guard over bridges and causeways includes authority to approve the removal of such structures when the owners thereof desire to discontinue their use. If the owner of a bridge or causeway discontinues its use and wishes to remove or alter any part thereof in such a manner that is will lose its character as a bridge or causeway, the Coast Guard will normally require removal of the structure from the waterway in its entirety. However, if the owner of a bridge or a causeway wishes to retain it in whole or in part for use other than for operation and maintenance as a bridge or causeway, the proposed structure will be considered as coming within the jurisdiction of the Corps of Engineers. The Coast Guard will refer requests for such uses to the Corps of Engineers for consideration. The Corps of Engineers agrees to advise the Commandant of the receipt of an application for approval of the conversion of a bridge or causeway to another structure and to provide opportunity for comment thereon. If the Corps of Engineers approves the conversion of a bridge or causeway to another structure, no residual jurisdiction over the structure will remain with the Coast Guard. However, if the Corps of Engineers does not approve the proposed conversion, then the structure remains a bridge subject to the jurisdiction of the Coast Guard.

5. CLOSURE OF WATERWAYS AND RESTRICTION OF PASSAGE THROUGH OR UNDER BRIDGES

Under the statutes cited in Section 1 of this Memorandum of Agreement, the Commandant must approve the clearances to be made available for navigation through or under bridges. It is understood that this duty and authority extends to and may be exercised in connection with the construction, alteration, operation, maintenance and removal of bridges, and includes the power to authorize the temporary restriction of passage through or under a bridge by use of falsework, piling, floating equipment, closure of draws, or any works or activities which temporarily reduce the navigation clearances and design flood flows, including closure of any or all spans of the bridge. Moreover, under the Ports and Waterways Safety Act of 1972, Public Law 92-340, 86 Stat. 424, the Commandant exercises broad powers in waterways to control vessel traffic in areas he determines to be especially hazardous and to establish safety zones or other measures for limited controls or conditional access and activity when necessary to prevent damage to or the destruction or loss of, any vessel bridge, or other structure on or in the navigable waters of the United States. Accordingly, in the event that work in connection with the construction, alteration or repair of a bridge or causeway is of such a nature that for the protection of life and property navigation through or in the vicinity of the bridge or causeway must be temporarily prohibited, the Coast Guard may close that part of the affected waterway while such work is being performed. However, it is also clear that the Secretary of the Army and the Chief of Engineers have the authority, under Section 4 of the Act of August 18, 1894, as amended (33 U.S.C. 1), to prescribe rules for the use, administration and navigation of the navigable waters of the United States. In recognition of that authority, and pursuant to Section 102(c) of the Ports and Waterways Safety Act, the Coast Guard will consult with the Corps of Engineers when any significant restriction of passage through or under a bridge is contemplated to be authorized or a waterway is to be temporarily closed.

6. COORDINATION AND COOPERATION PROCEDURES

A. District Commanders, Coast Guard Districts shall send notices of applications for permits for bridge or causeway construction, modification, or removal to the Corps of Engineers Divisions and Districts in which the bridge or causeway is located.

B. District Engineers, Corps of Engineers, shall send notices of applications for permits for other structures or dredge and fill work to local Coast Guard District Commanders.

C. In cases where proposed structures or modifications of structures do not clearly fall within one of the classifications set forth in paragraph 4.A. above, the application will be forwarded with recommendations of the reviewing officers through channels to the Chief of Engineers and the commandant of the Coast Guard who shall, after mutual consultation, attempt to resolve the questions.

D. If the above procedures fail to produce agreement, the application will be forwarded to the Secretary of the Army and Secretary of Transportation for their determination.

E. The Chief of Engineers and the Commandant, Coast Guard pledge themselves to mutual cooperation and consultation in making available timely information and data, seek uniformity and consistency among field offices, and providing timely and adequate review of all matters arising in connection with the administration of their responsibilities governed by the Acts cited herein.

Dated: March 21, 1973.

C.R. BENDER.

Dated: April 18, 1973.

F. J. CLARKE.

APPENDIX B—DELEGATION OF AUTHORITY TO ISSUE OR DENY PERMITS FOR CONSTRUCTION OR OTHER WORK AFFECTING NAVIGABLE WATERS OF THE UNITED STATES

May 24, 1971.

Pursuant to the authority vested in me by the Act of March 3, 1899, c425, Sections 10 and 14, 30 Stat. 1151, 1152, 33 U.S.C. Sections 403 and 408, and the Act of June 13, 1902, c.1079, Section 1, 32 Stat. 371, 33 U.S.C. Section 565, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits for construction or other work affecting navigable waters of the United States. Except in cases involving applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior, the Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed work on the public interest. In cases involving applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior, the Chief of Engineers, shall, in exercising such authority, evaluate the impact of the proposed work on navigation and national security. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Act.

The Chief of Engineers and his authorized representative shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

STANLEY R. RESOR,
Secretary of the Army.

PART 323—PERMITS FOR DISCHARGES OF DREDGED OR FILL MATERIAL INTO WATERS OF THE UNITED STATES

Sec.
323.1 General.
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323.5 Special policies and procedures.
Appendix A—Delegation of authority.

AUTHORITY: 33 U.S.C. 1344.

SOURCE: 42 FR 37144, July 19, 1977, unless otherwise noted.

§ 323.1 General.

This regulation prescribes, in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325, those special policies, practices, and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the discharge of dredged or fill material into waters of the United States pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. 1344) (hereinafter referred to as Section 404). See 33 CFR 320.2(g). Certain discharges of dredged or fill material into waters of the United States are also regulated under other authorities of the Department of the Army. These include dams and dikes in navigable waters of the United States pursuant to Section 9 of the River and Harbor Act of 1899 (33 U.S.C. 401; see 33 CFR 321) and structures or work in or affecting navigable waters of the United States pursuant to Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403; see 33 CFR 322). A Department of the Army permit will also be required under these additional authorities if they are applicable to activities involving discharges of dredged or fill material into waters of the United States. Applicants for Department of the Army permits under this Part should refer to the other cited authorities and implementing regulations for these additional permit requirements to determine whether they also are applicable to their proposed activities.

§ 323.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means:[1]

(1) The territorial seas with respect to the discharge of fill material. (The transportation of dredged material by vessel for the purpose of dumping in the oceans, including the territorial seas, at an ocean dump site approved under 40 CFR 228 is regulated by Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413). See 33 CFR 324. Discharges of dredged or fill material into the territorial seas are regulated by Section 404.):

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

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[1] The terminology used by the FWPCA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands; and

(5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[2]

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction and all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast) and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(e) The term "natural lake" means a standing body of open water that occurs in a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream.

(f) The term "impoundment" means a standing body of open water created by artifically blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins cooling, or rice growing.

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[2] In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a)(1)-(4) fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests; however, it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act. Discharges of dredged or fill material into waters of the United States identified in paragraphs (a)(1)-(4) will generally require individual or general permits unless those discharges occur beyond the headwaters of a river or stream or in natural lakes less than 10 acres in surface area. Discharges into these latter waters and into most of the waters identified in paragraph (a)(5) will be permitted by this regulation, subject to the provisions listed in paragraph 323.4-2(b) unless the District Engineer develops information, on a case-by-case basis, that the concerns for the aquatic environment as expressed in the EPA Guidelines (40 CFR 230) require regulation through an individual or general permit. (See 323.4-4).

(g) The term "ordinary high water mark" means the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation, the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(h) The term "high tide line" means a line or mark left upon tide flats, beaches, or along shore objects that indicates the intersection of the land with the water's surface at the maximum height reached by a rising tide. The mark may be determined by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The term includes spring high tides and other high tides that occur with periodic frequency, but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(i) The term "headwaters" means the point on a non-tidal stream above which the average annual flow is less than five cubic feet per second.[3] The District Engineer may estimate this point from available data by using the mean annual area precipitation, area drainage basin maps, and the average runoff coefficient, or by similar means.

(j) The term "primary tributaries" means the main stems of tributaries directly connecting to navigable waters of the United States up to their headwaters, and does not include any additional tributaries extending off of the main stems of these tributaries.

(k) The term "dredged material" means material that is excavated or dredged from waters of the United States.

(l) The term "discharge of dredged material" means any addition of dredged material into the waters of the United States. The term includes, without limitation, the addition of dredged material to a specified disposal site located in waters of the United States and the runoff or overflow from a contained land or water disposal area. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Federal Water Pollution Control Act even though the extraction and deposit of such material may require a permit from the Corps of Engineers. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

(m) The term "fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under Section 402 of the Federal Water Pollution Control Act Amendments of 1972.

(n) The term "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs. The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products.

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[3] For streams that are dry during long periods of the year, District Engineers, after notifying the Regional Administrator of EPA, may establish the headwater point as that point on the stream where a flow of five cubic feet per second is equaled or exceeded 50 percent of the time. The District Engineer shall notify the Regional Administrator of his determination of these headwater points.

(o) The term "individual permit" means a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving the proposed discharge(s) in accordance with the procedures of this regulation and 33 CFR 325 and a determination that the proposed discharge is in the public interest pursuant to 33 CFR Part 320.

(p) The term "general permit" means a Department of the Army authorization that is issued for a category or categories of discharges of dredged or fill material that are substantially similar in nature and that cause only minimal individual and cumulative adverse environmental impact. A general permit is issued following an evaluation of the proposed category of discharges in accordance with the procedures of this regulation (§ 323.3(c)), 33 CFR Part 325, and a determination that the proposed discharges will be in the public interest pursuant to 33 CFR Part 320.

(q) The term "nationwide permit" means a Department of the Army authorization that has been issued by this regulation in § 323.4 to permit certain discharges of dredged or fill material into waters of the United States throughout the Nation.

§ 323.3 Discharges requiring permits.

(a) *General.* Department of the Army permits will be required for the discharge of dredged or fill material into waters of the United States. Certain discharges specified in §§ 323.4-1, 323.4-2 and 323.4-3 are permitted by this regulation. If a discharge of dredged or fill material is not permitted by this regulation, an individual or general Section 404 permit will be required for the discharge of dredged or fill material into waters of the United States in accordance with the following phased schedule:

(1) Before July 25, 1975, discharges into navigable waters of the United States.

(2) After July 25, 1975, discharges into navigable waters of the United States and adjacent wetlands.

(3) After September 1, 1976, discharges into navigable waters of the United States and their primary tributaries, including adjacent wetlands, and into natural lakes, greater than 5 acres in surface area. (See also § 323.4-2 for discharges that are permitted by this regulation.)

(4) After July 1, 1977, discharges into all waters of the United States. (See also § 323.4-2 for discharges that are permitted by this regulation.)

(b) *Individual permits.* Unless permitted by this regulation (§§ 323.4-1, 323.4-2 and 323.4-3) or authorized by general permits (§ 323.3(c)), the discharge of dredged or fill material into waters of the United States will require an individual Department of the Army permit issued in accordance with the policies in § 320.4 and procedures in 33 CFR Part 325.

(c) *General permits.* The District Engineer may, after compliance with the other procedues of 33 CFR Part 325, issue general permits for certain clearly described categories of structures or work, including discharges of dredged or fill material; requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories will not require individual permit processing by the procedures of 33 CFR Part 325 unless the District Engineer determines, on a case-by-case basis, that the public interest requires individual review.

(1) District Engineers will include only those activities that are substantially similar in nature, that cause only minimal adverse environmental impact when performed separately, and that will have only a minimal adverse cumulative effect on the environment as categories which are candidates for general permits.

(2) The District Engineer shall include appropriate conditions as speci-

fied in Appendix C of 33 CFR Part 325 in each general permit and shall prescribe the following additional conditions:

(i) The maximum quantity of material that may be discharged and the maximum area that may be modified by a single or incidental operation (if applicable);

(ii) A description of the category or categories of activities included in the general permit; and

(iii) The type of water(s) into which the activity may occur.

(3) The District Engineer may require reporting procedures.

(4) A general permit may be revoked if it is determined that the effects of the activities authorized by it will have an adverse impact on the public interest provided the procedures of 33 CFR 325.7 are followed. Following revocation, applications for future activities in areas covered by the general permit shall be processed as applications for individual permits.

(d) *Activities of Federal agencies.* (1) Discharges of dredged or fill material into waters of the United States done by or on behalf of any Federal agency, or instrumentality other than the Corps of Engineers, are subject to the authorization procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulation. Division and District Engineers will therefore advise Federal agencies and instrumentalities accordingly and cooperate to the fullest extent in the expeditious processing of their applications.

(2) The policy provisions set out in 33 CFR 320.4(j), relating to State or local authorizations, do not apply to discharges of dredged or fill material into waters of the United States undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the appropriate State, interstate and local water-quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Federal Water Pollution Control Act, as amended, in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 11752, dated 17 Dec. 73). They are not required, however, to provide certification of compliance with effluent limitations and water-quality standards from State or interstate water pollution control agencies in connection with activities involving discharges into waters of the United States.

(e) *Activities licensed under the Federal Power Act of 1920.* Any part of a structure or work licensed by the Federal Power Commission that involves the discharge of dredged or fill material into waters of the United States shall require a Department of the Army authorization under this regulation.

§ 323.4 Discharges permitted by this regulation.

(a) *General.* Discharges of dredged or fill material specified in §§ 323.4-1, 323.4-2 and 323.4-3, below are hereby permitted for purposes of Section 404 without further processing under this regulation (individual applications are not needed), except as provided in § 323.4-4 below. Permits may, however, be required under Section 10 of the River and Harbor Act of 1899 (see 33 CFR 322). Sections 323.4-1, 323.4-2, and 323.4-3 do not obviate the requirement to obtain State or local assent required by law for the activities permitted therein.

(b) *Management practices.* In addition to the conditions specified in §§ 323.4-2(b) and 323.4-3(b), the following management practices should be followed, to the maximum extent practicable, in the discharge of dredged or fill material permitted by §§ 323.4-2 and 324.4-3 to minimize the adverse effects of these discharges on the aquatic environment:

(1) Discharges of dredged or fill material into waters of the United States should be avoided or minimized through the use of other practical alternatives;

(2) Discharges in spawning areas during spawning seasons should be avoided;

(3) Discharges should not restrict or impede the movement of aquatic species indigenous to the waters or the passage of normal or expected high flows or cause the relocation of the waters (unless the primary purpose of the fill is to impound waters);

(4) If the discharge creates an impoundment water, adverse impacts on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow, should by minimized;

(5) Discharges in wetlands areas should be avoided;

(6) Heavy equipment working in wetlands should be placed on mats;

(7) Discharges into breeding and nesting areas for migratory waterfowl should be avoided; and

(8) All temporary fills should be removed in their entirety.

§ 323.4-1 Discharges prior to effective dates of phasing.

(a) Discharges of dredged or fill material in waters of the United States that occur before the phase-in dates specified in § 323.3(a)(2)-(4) above are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) below are met.

(b) Discharges of dredged or fill material of less than 500 cubic yards into waters other than navigable waters of the United States (see 33 CFR 329) that are part of an activity that was commenced before July 25, 1975, that were completed by January 25, 1976, and that involve a single and complete project and not a number of projects associated with a complete development plan are hereby permitted for purposes of Section 404, provided the conditions in paragraph (c) below are met. The term "commenced" as used herein shall be satisfied if there has been, before July 25, 1975, some discharge of dredged or fill material as a part of the above activity or an entering into of a written contractual obligation to have the dredged or fill material discharged at a designated disposal site by a contractor.

(c) For the purposes of Section 404, the following conditions must have been satisfied for the discharges occurring before the dates specified in paragraph (a) and (b) above:

(1) That the discharge was not located in the proximity of a public water intake;

(2) That the discharge did not contain unacceptable levels of pathogenic organisms in areas used for recreation involving physical contact with the water;

(3) That the discharge did not occur in areas of concentrated shellfish production; and

(4) That the discharge did not destroy or endanger the critical habitat or a threatened or endangered species, as identified under the Endangered Species Act.

§ 323.4-2 Discharges into certain waters of the United States.

(a) Discharges of dredged or fill material into the following waters of the United States are hereby permitted for purposes of Section 404, provided the conditions in paragraph (b) below are met:

(1) Non-tidal rivers, streams and their impoundments including adjacent wetlands that are located above the headwaters;

(2) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are fed or drained by a river or stream above the headwaters. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark;

(3) Natural lakes, including their adjacent wetlands, that are less than 10 acres in surface area and that are isolated and not a part of a surface river or stream. In the absence of adjacent wetlands, the surface area of a lake shall be determined at the ordinary high water mark; and

(4) Other non-tidal waters of the United States other than isolated lakes larger than 10 acres (see (3) above) that are not part of a surface tributary system to interstate waters or navigable waters of the United States (see § 323.2(a)(5)).

(b) For purposes of Section 404, the following conditions must be satisfied for any discharge of dredged or fill material in waters described in paragraph (a), above:

(1) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species;

(2) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities;

(3) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(4) That the discharge will not occur in a component of the National Wild and Scenic Rivers System or in a component of a State wild and scenic river system.

§ 323.4-3 Specific categories of discharges.

(a) The following discharges of dredged or fill material into waters of the United States are hereby permitted for purposes of Section 404, provided the conditions specified in this paragraph and paragraph (b) below are met:

(1) Dredged or fill material placed as backfill or bedding for utility line crossings provided there is no change in preconstruction bottom contours (excess material must be removed to an upland disposal area). A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquifiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication. (The utility line will require a Section 10 permit if in navigable waters of the United States. See 33 CFR Part 322.);

(2) Material discharged for bank stabilization, provided that the bank stabilization activity is less than 500 feet in length, is necessary for erosion prevention, and is limited to less than an average of one cubic yard per running foot along the bank, provided further that no material for bank stabilization is placed in any wetland area, and provided further that no material is placed in any locality or in any manner so as to impair surface water flow into or out of any wetland area. (This activity will require a Section 10 permit if in navigable waters of the United States. See 33 CFR part 322.);

(3) Minor road crossing fills including all attendant features both temporary and permanent that are part of a single and complete crossing of a non-tidal waterbody provided that the crossing is culverted or bridged to prevent the restriction of expected high flows and provided further that discharges into any wetlands adjacent to the waterbody do not extend beyond 100 feet on either side of the ordinary high water mark of that waterbody. A "minor road crossing fill" is defined as a crossing that involves the discharge of less than 200 cubic yards of fill material below the plane of ordinary high water. The crossing will require a permit from the U.S. Coast Guard if located in navigable waters of the United States (see 33 U.S.C. 401);

(4) Fill placed incidental to the construction of bridges across tidal waters including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills. Approach fills and causeways are not included in this permit and will require an individual or general Section 404 permit if located in waters of the United States; these fills as well as the bridge itself will also require a permit from the U.S. Coast Guard; and

(5) The repair, rehabilitation or replacement of any previously authorized, currently serviceable fill, or of any currently serviceable fill discharged prior to the requirement for authorization; provided such repair, rehabilitation or replacement does not result in a deviation from the specifications of the original work, and further provided that the fill to be maintained has not been put to uses differing from uses specified for it in any permit authorizing its original construction.

(b) For the purposes of Section 404, the following conditions must be satisfied prior to any discharge of dredged or fill material associated with the activities described above:

(1) That the discharge will not be located in the proximity of a public water supply intake;

(2) That the discharge will not occur in areas of concentrated shellfish production;

(3) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species;

(4) That the dicharge will not disrupt the movement of those species of aquatic life indigenous to the waterbody;

(5) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities;

(6) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(7) That the discharge will not occur in a component of the National Wild and Scenic River System or in a component of a State wild and scenic river system.

§ 323.4-4 Discretionary authority to require individual or general permits.

Nothwithstanding the provisions of §§ 323.4-1, 323.4-2, and 323.4-3, above, the procedures of this regulation and 33 CFR Part 325, including those pertaining to individual and general permits, shall apply to any discharge(s) of dredged or fill material if the District Engineer determines that the concerns of the aquatic environment, as expressed in the guidelines (see 40 CFR Part 230) indicate the need for such action because of individual and/or cumulative adverse impacts to the affected waters. In such cases, he shall take such steps as are necessary to notify persons who would be affected by such action. If the Regional Administrator, EPA, advises the District Engineer that the concerns for the aquatic environment as expressed in the Section 404(b) Guidelines require assertion of jurisdiction under § 323.4-4, and the District Engineer and Division Engineer disagree, the Office of the Chief of Engineers (DAEN-CWO-N and DAEN-CCH) shall be notified for further coordination and resolution with the Administrator.

§ 323.5 Special policies and procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 404 permits. (See Appendix A.) The following additional special procedures shall also be aplicable to the evaluation of permit applications under this regulation:

(a) *EPA Guidelines.* Applications for permits for the discharge of dredged or fill material into waters of the United States will be reviewed in accordance with guidelines promulgated by the Administrator, EPA, under authority of Section 404(b) of the Federal Water Pollution Control Act. (See 40 CFR Part 230.) If the EPA guidelines alone prohibit the designation of a proposed disposal site, the economic impact on navigation and anchorage of the failure to authorize the use of the proposed disposal site will also be considered in evaluating whether or not the proposed discharge is in the public interest.

(b) *Coordination with EPA.* Prior to actual issuance of permits for the discharge of dredged or fill material in waters of the United States, Corps of Engineers officials will advise appropriate Regional Administrators, EPA, of the intent to issue permits to which EPA has objected, recommended conditions, or for which significant changes are proposed. If the Regional Administrator advises, within fifteen days of the advice of the intent to issue, that he objects to the issuance of the permits, the case will be forwarded to the Chief of Engineers in accordance with 33 CFR 325.11 for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain an analysis of the economic impact on navigation and anchorage that would occur by failing to authorize the use of a proposed disposal site, and whether there are other economically feasible methods or sites available other than those to which the Regional Administrator objects.

APPENDIX A—DELETION OF AUTHORITY TO ISSUE OR DENY PERMITS FOR THE DISCHARGE OF DREDGED OR FILL MATERIAL INTO NAVIGABLE WATERS

MARCH 12, 1973.

Pursuant to the authority vested in me by Section 404 of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, P.L. 92-500, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits, after notice and opportunity for public hearings, for the discharge of dredged or filled material into navigable waters at specified disposal sites. The Chief of Engineers shall, in exercising such authority, evaluate the impact of the proposed discharge on the public interest. All permits issued shall specify a disposal site for the discharge of the dredged or fill material tnrough the application of guidelines developed by the Administrator of the Environmental Protection Agency and myself. In those cases where these guidelines would prohibit the specification of a disposal site, the Chief of Engineers, in his evaluation of whether the proposed discharge is in the public interest, is authorized also to consider the economic impact on navigation and anchorage which would occur by failing to authorize the use of a proposed disposal site. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to elect the purposes of the above Act, other pertinent laws and any applicable memoranda of understanding between the Secretary of the Army and heads of other governmental agencies.

The Chief of engineers and his authorized representative shall exercise the authority hereby delegated subject to such conditions as I or my authorized representative may from time to time impose.

KENNETH E. BELIEU,
Acting Secretary of the Army.

PART 324—PERMITS FOR OCEAN DUMPING OF DREDGED MATERIAL

Sec.

324.1 General.
324.2 Definitions.
324.3 Activities requiring permits.
324.4 Special procedures.
Appendix A—Delegation of authority.

AUTHORITY: 33 U.S.C. 1413.

SOURCE: 42 FR 37147, July 19, 1977, unless otherwise noted.

§ 324.1 General.

This regulation prescribes in addition to the general policies of 33 CFR 320.4 and procedures of 33 CFR Part 325, those special policies, practices and procedures to be followed by the Corps of Engineers in connection with the review of applications for Department of the Army permits to authorize the transportation of dredged material by vessel for the purpose of dumping it in ocean waters at dumping sites designated under 40 CFR Part 228 pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413), (hereinafter referred to as Section 103). See 33 CFR 320.2(h). Activities involving the transportation of dredged material for the purpose of dumping in the ocean waters also require Department of the Army permits under Section 10 of the River and Harbor Act of 1899 (33 U.S.C. 403) for the dredging in navigable waters of the United States. Applicants for Department of the Army permits under this Part should also refer to 33 CFR Part 322 to satisfy the requirements of Section 10.

§ 324.2 Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "ocean waters" means those waters of the open seas lying seaward of the base line from which the territorial sea is measured, as provided for in the Convention on the Territorial Sea and the Contiguous Zone (15 UST 1606; TIAS 5639).

(b) The term "dredged material" means any material excavated or dredged from navigable waters of the United States or ocean waters.

(c) The term "transport" or "transportation" refers to the carriage and related handling of dredged material by a vessel.

§ 324.3 Activities requiring permits.

(a) *General.* Department of the Army permits are required for the transportation of dredged material for the purpose of dumping it in ocean waters.

(b) *Activities of Federal agencies.* (1) The transportation of dredged material for the purpose of dumping in ocean waters done by or on behalf of any Federal agency other than the activities of the Corps of Engineers are subject to the procedures of this regulation. Agreement for construction or engineering services performed for other agencies by the Corps of Engineers does not constitute authorization under the regulation. Division and District Engineers will therefore advise Federal agencies accordingly and cooperate to the fullest extent in the expeditious processing of their applications. The activities of the Corps of Engineers that involve the transportation of dredged material for dumping in ocean waters are regulated by 33 CFR 209.145.

(2) The policy provisions set out in 33 CFR 320.4(j) relating to State or local authorizations do not apply to work or structures undertaken by Federal agencies, except where compliance with non-Federal authorization is required by Federal law or Executive policy. Federal agencies are required to comply with the substantive State, interstate, and local water-quality standards and effluent limitations as are applicable by law that are adopted in accordance with or effective under the provisions of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and related laws in the design, construction, management, operation, and maintenance of their respective facilities. (See Executive Order No. 11752, dated 17 Dec. 73.) They are not required, however, to obtain and provide certification of compliance with effluent limitations and water-quantity standards from State or interstate water pollution control agencies in connection with activities involving discharges into ocean waters.

§ 324.4 Special procedures.

The Secretary of the Army has delegated to the Chief of Engineers the authority to issue or deny Section 103 permits. (See Appendix A.) The following additional procedures shall also be applicable under this regulation.

(a) *Public notice.* For all applications for Section 103 permits, the District Engineer will issue a public notice which shall contain, in addition to the information specified in 33 CFR 325.3, the following information:

(1) The location of the proposed disposal site and its physical boundaries;

(2) A statement as to whether the site has been designated for use by the Administrator, EPA, pursuant to Section 102(c) of the Act;

(3) If the proposed disposal site has not been designated by the Administrator, EPA, a description of the characteristics of the proposed disposal site and an explanation as to why no previously designated disposal site is feasible;

(4) A brief description of known dredged material discharges at the proposed disposal site;

(5) Existence and documented effects of other authorized dumpings that have been made in the dumping area (e.g., heavy metal background reading and organic carbon content);

(6) An estimate of the length of time during which disposal will continue at the proposed site;

(7) Characteristics and composition of the dredged material; and

(8) A statement concerning a preliminary determination of the need for and/or availability of an environmental impact statement.

(b) *Evaluation.* Applications for permits for the transportation of dredged material for the purpose of dumping it in ocean waters will be evaluated to determine whether the proposed dumping will unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems or economic potentialities. In making this evaluation, criteria established by the Administrator, EPA, pursuant to Section 102 of the Marine Protection Research and Sanctuaries Act of 1972, as amended, shall be applied including an evaluation of the need for the ocean dumping and including the availability of alternatives to ocean dumping. Where ocean dumping is determined to be necessary, the District Engineer will, to the extent feasible, specify disposal sites using the recommendations of the Administrator pursuant to Section 102(c) of the Act. See 40 CFR Parts 220 to 229.

(c) *EPA review.* If the Regional Administrator, EPA, advises the District Engineer that the proposed dumping will comply with the criteria the District Engineer shall complete his evaluation of the Section 103 application under this regulation and 33 CFR Parts 320 and 325. If, however, the Regional Administrator advises the District Engineer that the proposed dumping will not comply with the criteria, the District Engineer will proceed as follows.

(1) The District Engineer shall determine whether there is an economically feasible alternative method or site available other than the proposed ocean disposal site. If there are other feasible alternative methods or sites available, the District Engineer shall evaluate them in accordance with 33 CFR Parts 320, 322, 323, 325 and this regulation, as appropriate.

(2) If the District Engineer makes a determination that there is no economically feasible alternative method or site available, he shall so advise the Regional Administrator of his intent to issue the permit setting forth his reasons for such determination.

(d) *EPA objection.* If the Regional Administrator advises, within 15 days of the notice of the intent to issue, that he still objects to the issuance of the permit, the case will be forwarded to the Chief of Engineers, for further coordination with the Administrator, EPA, and decision. The report forwarding the case will contain, in addition to the analysis required by 33 CFR 325.11, an analysis of whether there are other economically feasible methods or sites available to dispose of the dredged material.

(e) *Chief of Engineers review.* The Chief of Engineers shall evaluate the permit application and make a decision to deny the permit or recommend its issuance. If the decision of the Chief of Engineers is that ocean dumping at the proposed disposal site is required because of the unavailability of economically feasible alternatives, he shall so certify and request that the Secretary of the Army seek a waiver from the Administrator, EPA, of the criteria or of the critical site designation in accordance with 40 CFR 225.4.

APPENDIX A—DELEGATION OF AUTHORITY TO ISSUE OR DENY PERMITS FOR THE TRANSPORTATION OF DREDGED MATERIAL FOR THE PURPOSE OF DUMPING IT INTO OCEAN WATERS

March 12, 1973.

Pursuant to the authority vested in me by Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052, Pub. L. 92-532, I hereby authorize the Chief of Engineers and his authorized representatives to issue or deny permits, after notice and opportunity for public hearings, for the transportation of dredged material for the purpose of dumping it in ocean waters. The Chief of Engineers and his authorized representatives shall, in exercising such authority, evaluate the impact of the proposed dumping on the public interest. No permit shall be issued unless a determination is made that the proposed dumping will not unreasonably degrade or endanger human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities. In making this determination, those criteria for ocean dumping established by the Administrator of the Environmental Protection Agency pursuant to Section 102(a) of the above Act which relate to the effects of the proposed dumping shall be applied. In addition, based upon an evaluation of the potential effect which a permit denial will have on navigation, economic and industrial development, and foreign and domestic commerce of the United States, the Chief of Engineers or his authorized representatives, in evaluating the permit application, shall make an independent determination as to the need for the dumping, other possible methods of disposal, and appropriate locations for the dumping. In considering appropriate disposal sites, recommended sites designated by the Administrator of the Environmental Protection Agency pursuant to Section 102(c) of the above Act will be utilized to the extent feasible. Prior to issuing any permit, the Chief of Engineers or his authorized representatives shall first notify the Administrator of the Environmental Protection Agency or his authorized representative of his intention to do so. In any case in which the Administrator or his authorized representative disagrees with the determination of the Chief of Engineers or his authorized representative as to compliance with the criteria established prusuant to Section 102(a) of the above Act relating to the effects of the dumping or with the restrictions established pursuant to Section 102(c) of the above Act relating to critical areas, the determination of the Administrator or his authorized representative shall prevail. If, in any such case, the Chief of Engineers or his Director of Civil Works finds that, in the disposition of dredged material, there is no economically feasible method or site available other than a dumping site the utilization of which would result in noncompliance with such criteria or restrictions, he shall so certify and request that I seek a waiver from the Administrator of the Environmental Protection Agency of the specific requirements involved. Unless the administrator of the Environmental Protection Agency grants a waiver, the Chief of Engineers or his authorized representatives shall not issue a permit which does not comply with such criteria and restrictions. The permits so granted may be made subject to such special conditions as the Chief of Engineers or his authorized representatives may consider necessary in order to effect the purposes of the above Act, other pertinent laws, and any applicable memoranda of understanding between the Secretary of the Army and the heads of other governmental agencies.

The Chief of Engineers and his authorized representative shall exercise the authority herby delegated subject to such conditions as I or my authorized representative may from time to time impose.

KENNETH E. BELIEU,
Acting Secretary of the Army.

PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

Sec.

325.1 Applications for permits.
325.2 Processing of applications.
325.3 Public notice.
325.4 Environmental impact statement.
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Appendix A—Permit Form.

Appendix B—Army/Interior Memorandum of Understanding.

AUTHORITY: 33 U.S.C. 401 et seq.: 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 42 FR 37149, July 19, 1977, unless otherwise noted.

§ 325.1 Applications for permits.

(a) *General.* The processing procedures of this regulation (Part 325) apply to any form of Department of the Army permit. Special procedures and additional information are contained in Parts 320 through 324. This Part is arranged in the basic timing sequence used by the Corps of Engineers in processing Department of the Army permits.

(b) *Application form.* Any person proposing to undertake any activity requiring Department of the Army authorization as specified in 33 CFR 321-324 must apply for a permit to the District Engineer in charge of the District where the proposed activity is to be performed. Applications for permits must be prepared in accodance with instructions in Engineer Pamphlet 1145-2-1, "A Guide for Applicants," utilizing the prescribed application form (ENG Form 4345). The form and pamphlet may be obtained from the District Engineer having jurisdiction over the waterway in which the propose activity will be located. Local variations of the application form for purposes of facilitating coordination with State and local agencies may be used.

(c) *Content of application.* (1) Generally, the application must include a complete description of the proposed activity including necessary drawings, sketches or plans; the location, purpose and intended use of the proposed activity; scheduling of the activity; the names and addresses of adjoining property owners; the location and dimensions of adjacent structures; and the approvals required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made.

(2) If the activity involves dredging in waters of the United States, the application must include a description of the type, composition and quantity of the material to be dredged, the method of dredging, and the site and plans for disposal of the dredged material.

(3) If the activity includes the discharge of dredged or fill material in the waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the application must include the source of the material; a description of the type, composition and

quantity of the material; the method of transportation and disposal of the material; and the location of the disposal site. (See Part 324 for additional information requirements on ocean dumping applications.) Certification under Section 401 of the Federal Water Pollution Control Act is required for such discharges into water of the United States.

(4) If the activity includes the construction of a fill or pile or float-supported platform, the project description must include the use and specific structures to be erected on the fill or platform.

(d) *Additional information.* In addition to the information indicated in subparagraph (c), above, the applicant will be required to furnish such additional information as the District Engineer may deem mecessary to assist him in his evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites, as may be necessary for the preparation of the Environmental Assessment or Environmental Impact Statement (see § 325.4).

(e) *Signature of application.* The application must be signed by the person who desires to undertake the proposed activity; however, the application may be signed by a duly authorized agent if accompanied by a statement by that person designating the agent and agreeing to furnish, upon request, supplemental information in support of the application. In either case, the signature of the applicant will be understood to be an affirmation that he possesses the authority to undertake the activity proposed in his application, except where the lands are under the control of the Corps of Engineers, in which cases the District Engineer will coordinate the transfer of the real estate and the permit action. When the application is submitted by an agent, the application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area.

(f) *Fees.* Fees are required for permit applications under Section 404 of the Federal Water Pollution Control Act Amendments of 1972. Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and Sections 9 and 10 of the River and Harbor Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commerical or industrial in nature and is an support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the work is non-commerical in nature and provides personal benefits that have no connection with a commercial enterprise. The final decision as to basis for fee (commercial vs. non-commerical) shall be solely the responsibility of the District Engineer. No fee will be charged if the applicant withdraws his application at any time prior to issuance of the permit and/or if his application is denied. Collection of the fee will be deferred until the applicant is notified by the District Engineer that a public interest review has been completed and that the proposed activity has been determined to be in the public interest. Upon receipt of this notification the applicant will forward a check or money order to the District Engineer, made payable to the Treasurer of the United States. The permit will then be issued upon receipt of the application fee. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require a permit will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions or general permits. Agencies or instrumentalities of Federal, State or local governments will not be required to pay any fee in connection with the applications for permits. This fee structure will be reviewed from time to time.

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received, the District Engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness, and obtain from the applicant any additional information he deems necessary for further processing.

(2) When all required information has been provided, the District Engineer will issue a public notice as described in § 325.3, below, unless specifically exempted by other provisions of this regulation.

(3) The District Engineer shall consider all comments received in response to the public notice (see § 325.3) in his subsequent actions on the permit application. Receipt of the comments will be acknowledged and they will be made a part of the official file on the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another Federal agency, the District Engineer may seek the advice of that agency. The applicant must be given the opportunity to furnish the District Engineer his proposed resolution or rebuttal to all objections from Government agencies and other substantive adverse comments before final decision will be made on the application.

(4) The District Engineer shall prepare an Environmental Assessment on all applications. The Environmental Assessment shall be dated, signed, and placed in the record and shall include the expected environmental impacts of the proposal. Where the District Engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the Environmental Assessment. In those cases requiring an Environmental Impact Statement (EIS), the draft EIS may serve as the Environmental Assessment. Where an EIS is not prepared, the Environmental Assessment will include a statement that the decision on the application is not a major Federal action significantly affecting the quality of the human environment.

(5) The District Engineer shall also evaluate the proposed application to determine the need for a public hearing pursuant to 33 CFR Part 327.

(6) After all above actions have been completed, the District Engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a Findings of Fact on all applications to support his determination. The Findings of Fact shall include the District Engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material in waters of the United States (40 CFR Part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), if applicable, and the conclusions of the District Engineer. The Findings of Fact shall be dated, signed, and included in the record prior to final action on the application. Where the District Engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the Findings of Fact. If a permit is warranted, the District Engineer will determine the conditions and duration which should be incorporated into the permit. In accordance with the authorities specified in § 325.8, the District Engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final Environmental Impact Statement, if prepared, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in the format prescribed in § 325.11. Notice that the application has been forwarded to higher headquarters will be furnished the applicant and to any Federal agency expressing an interest in the application. Such notice shall not divulge the District Engineer's recommendations. In those cases where the application is forwarded for decision in the format prescribed in § 325.11, the report will serve as the Findings of Fact.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason for denial. If the final decision is to issue the permit, the issuing official will forward two copies of the draft permit to

the applicant for signature accepting the conditions of the permit. The applicant will return both signed copies to the issuing official who then signs and dates the permit. The permit is not valid until signed by the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of his application or signature of the issuing official on the authorizing document.

(8) The District Engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. This list will be distributed to all persons who received any of the public notices listed.

(9) If the applicant fails to respond within 45 days to any request or inquiry of the District Engineer, the District Engineer may advise the applicant by certified letter that his application will be considered as having been withdrawn unless the applicant responds thereto within thirty days of the date of the letter.

(b) *Procedures for particular types of permit situations.* (1) If the District Engineer determines that water quality certification for the proposed activity is necessary under the provisions of the Federal Water Pollution Control Act, he shall so notify the applicant and obtain from him either the appropriate certification or a copy of his application for such certification. The District Engineer may issue the public notice of the application jointly with the certifying agency if arragements for such joint notices have been approved by the Division Engineer. When the activity may affect the waters of another State, a copy of the certification will be forwarded to the Regional Administrator of EPA who shall determine if the proposed activity may affect the quality of the waters of any State or States other than the State in which the work is to be performed. If he needs supplemental information in order to make this determination, the Regional Administrator may request it from the District Engineer who shall obtain it from the applicant and forward it to the Regional Administrator. The Regional Administrator shall, within thirty days of receipt of the application, certification and supplemental information, notify the affected State, the District Engineer, and the applicant in the event such a second State may be affected. The second State then has sixty days to advise the District Engineer that it objects to the issuance of the permit on the basis of the effect on the quality of its waters and to request a hearing. No authorization will be granted until required certification has been obtained or has been waived. Waiver is deemed to occur if the certifying agency fails or refuses to act on a request for certification within a reasonable period of time after receipt of such request. The request for certification must be made in accordance with the regulations of the certifying agency. In determining whether or not a waiver period has commenced, the District Engineer will verify that the certifying agency has received a valid request for certification. Three months shall generally be considered to be a reasonable period of time. If, however, special circumstances identified by the District Engineer require that action on an application be taken within a more limited period of time, the District Engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly if it appears that circumstances may reasonably require a period of time longer than three months, the District Engineer may afford the certifying agency up to one year to provide the required certification before determining that a waiver has occurred. District Engineers shall check with the certifying agency at the end of the allotted period of time before determining that a waiver has occurred.

(2) If the proposed activity is to be undertaken in a State operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone

Management Act (see 33 CFR 320.3(b)), the District Engineer shall proceed as follows:

(i) If the applicant is a Federal agency, and the application involves a Federal activity in or affecting the coastal zone or a Federal development project in the coastal zone, the District Engineer shall forward a copy of the public notice to the agency of the State responsible for reviewing the consistency of Federal activities. The Federal agency applicant shall be responsible for complying with the Coastal Zone Management Act's directives for ensuring that Federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved coastal zone management programs. (See 15 CFR Part 930.) If the State coastal zone agency objects to the proposed Federal activity on the basis of its inconsistency with the State's approved coastal zone management program, the District Engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the Coastal Zone Management Act for resolving such disagreements.

(ii) If the applicant is not a Federal agency and the application involves an activity affecting the coastal zone, the District Engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved State coastal zone management program. Upon receipt of the certification, the District Engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the State coastal zone agency and request its concurrence of objection. The District Engineer can issue the public notice of the application jointly with the State agency if arrangements for such joint notices have been approved by the Division Engineer. If the State agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the District Engineer shall not issue the permit until the State concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the Coastal Zone Management Act or is necessary in the interest of national security. If the State agency fails to concur or object to a certification statement within six months of the State agency's receipt of the certification statement, State agency concurrence with the certification statement shall be conclusively presumed.

(3) If the proposed activity involves any property listed or eligible for listing in the National Register of Historic Places (which is published in its entirety in the FEDERAL REGISTER annually in February with addenda published each month), the District Engineer will proceed in accordance with 33 CFR Part 305.

(4) If the proposed activity consists of the dredging of an access channel and/or berthing facility associated with an authorized Federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the Federal project to the maximum extent feasible. Separate notice, hearing, and Environmental Impact Statement will not be required for activities so included and coordinated; and the public notice issued by the District Engineer for these Federal and associated non-Federal activities will be the notice of intent to issue permits for those included non-Federal dredging activities. The decision whether to issue or deny such a permit will be consistent with the decision on the Federal project unless special considerations applicable to the proposed activity are identified. (See § 322.5(a).)

(5) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(i) If the activity involves the construction of structures or artificial islands on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390: Attention, Code N512 and to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(ii) If the activity involves the construction of structures to enhance fish propagation (fish havens) along the coasts of the United States, to Defense Mapping Agency Hydographic Center and National Ocean Survey as in (i), above, and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(iii) If the activity involves the erection of an aerial transmission line across a navigable water of the United States, to the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852, reference C322.

(iv) If the activity is listed in subparagraphs (i), (ii), or (iii), above, or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(c) *Emergency procedures.* An "emergency" is a situation which would result in an unacceptable hazard to life or severe loss of property if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under required procedures. In such cases the District Engineer will explain the circumstance and recommend special procedures in writing to the Chief of Engineers, ATTN: DAEN-CWO-N. The Chief of Engineers, upon consultation with the Secretary of the Army or his authorized representative, will instruct the District Engineer as to further processing of the application.

(d) *Timing of processing of applications.* In view of the extensive coordination with other agencies and the public and the study of all aspects of proposed activities required by the above procedures, applicants must allow adequate time for the processing of their applications. The District Engineer will be guided by the following time limits for the indicated steps in processing permit applications:

(1) Public notice should be issued within fifteen days of receipt of all required information from the applicant, unless joint notice with State agencies is to be used.

(2) The receipt of comments as a result of the public notice should not extend beyond thirty days from the date of the notice. However, if unusual circumstances warrant, the District Engineer may extend the comment period up to a maximum of seventy-five days.

(3) The District Engineer should either send notice of denial to the applicant or issue the draft permit to the applicant for acceptance and signature, or forward the application to higher headquarters within thirty days of one of the following whichever is latest: Closing of the public notice comment period with no objections received; receipt of notice of withdrawal of objections; completion of coordination following receipt of applicant's rebuttal of objections; closing of the record of a public hearing; or expiration of the waiting period following the filing of the final Environmental Impact Statement with CEQ.

§ 325.3 Public notice.

(a) *General.* The Public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature of the activity to generate meaningful comments. The notice should include the following items of information:

(1) Applicable statutory authority or authorities;

(2) The name and address of the applicant;

(3) The location of the proposed activity;

(4) A brief description of the proposed activity, its purpose and intended use, including a description of the type of structures, if any, to be erected on fills, or pile or float-supported platforms, and a description of the type, composition and quantity of materials to be discharged or dumped and means of conveyance. See also 33 CFR 324 for additional information required on ocean dumping public notices;

(5) a plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

(6) If the proposed activity would occur in the territorial seas or ocean waters, a description of the activity's relationship to the baseline from which the territorial sea is measured;

(7) A list of other government authorizations obtained or requested, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;

(8) A statement concerning a preliminary determination of the need for and/or availability of an Environmental Impact Statement;

(9) Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest, including environmental values; and

(10) A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing, within which interested parties may express their views concerning the permit application.

(b) *Evaluation factors.* A paragraph describing the various factors on which decisions are based during evaluation of a permit application shall be included in every public notice.

(1) Except as provided in paragraph (b)(4) below, the following will be included:

> The decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity on the public interest. That decision will reflect the national concern for both protection and utilization of important resources. The benefit which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. All factors which may be relevant to the proposal will be considered; among those are conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production and, in general, the needs and welfare of the people.

(2) If the activity involves the discharge of dredged or fill material into the waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the public notice shall also indicate that the evaluation of the impact of the activity on the public interest will include application of the guidelines promulgated by the Administrator, EPA, under authority of Section 404(b) of the Federal Water Pollution Control Act (40 CFR Part 230) or of the criteria established under authority of Section 102(a) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (40 CFR Parts 220 to 228), as appropriate. See also 33 CFR Part 324.

(3) If the activity includes the discharge of dredged or fill material in the waters of the United States or the transportation of dredged material for the purpose of dumping it in ocean waters, the following statement will also be included in the public notice:

> Any person may request, in writing, within the comment period specified in this notice, that a public hearing be held to consider this application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing.

(4) In cases involving construction of fixed structures or artificial islands on Outer Continental Shelf lands which are under mineral lease from the Department of the Interior, the notice will contain the following statement: "The decision as to whether a permit will be issued will be based on an evaluation of the impact of the proposed work on navigation and national security."

(c) *Distribution of public notices.* (1) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate State agencies, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commission, and to any other interested party. If in the judgment of the District Engineer the proposal may result in substantial public interest, the public notice (without drawings) may be published for five consecutive days in the local newspaper, and the applicant shall reimburse the District Engineer for the costs of publication. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the Field Representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the Environmental Protection Agency (EPA), the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), the head of the State agency responsible for fish and wildlife resources, and the District Commander, U.S. Coast Guard.

(2) In addition to the general distribution of public notices cited above, notices will be sent to other addresses in appropriate cases as follows:

(i) If the activity involves structures or dredging along the shores of the sea or Great Lakes, to the Coastal Engineering Research Center, Washington, D.C. 20016.

(ii) If the activity involves construction of fixed structures or artificial islands on the Outer Continental Shelf or in the territorial seas, to the Deputy Assistant Secretary of Defense (Installations and Housing), Washington, D.C. 20310; the Director, Defense Mapping Agency, Hydrographic Center, Washington, D.C. 20390, Attention, Code N512; and the Director, National Ocean Survey, NOAA, Department of Commerce, Rockville, Maryland 20852.

(iii) If the activity involves the construction of structures to enhance fish propagation along the Atlantic, Pacific, and Gulf coasts, to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, D.C. 20235.

(iv) If the activity involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations, to the Regional Director of the Federal Aviation Administration.

(v) If the activity is in connection with a foreign-trade zone, to the Executive Secretary, Foreign-Trade Zones Board, Department of Commerce, Washington, D.C. 20230 and to the appropriate District Director of Customs as Resident Representative, Foreign-Trade Zones Board.

(3) It is presumed that all interested parties and agencies will wish to respond to public notices; therefore, a lack of response will be interpreted as meaning that there is no objection to the application. A copy of the public notice with the list of the addressees to whom the notice was sent will be included in the record. If a question develops with respect to an activity for which another agency has responsibility and that other agency has not responded to the public notice, the District Engineer may request their comments. Whenever a response to a public notice has been received from a member of Congress, either in behalf of a constituent of himself, the District Engineer will inform the member of Congress of the final decision.

(d) *General permit notices (RCS: DAEN-CWO-52).* For purposes of performing a nationwide analysis of the effectiveness of the general permit program, Division offices will submit "Public Notices on General Permits" reports (RCS: DAEN-CWO-52) by COB on the 15th day, following the end of each quarter, to HQDA (DAEN-CWO-N) Washington, D.C. 20314. Said reports will be in the form of a letter listing the public notices published during the previous month to announce proposals or to finalize issuances of general permits; copies of the public notices are to be made inclosures to the reports. Negative reports will be submitted if no general permit actions have taken place in the Division during the reporting period.

§ 325.4 Environmental impact statements.

(a) *General.* Section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA) requires all Federal agencies, with respect to major Federal actions significantly affecting the quality of the human environment, to submit to the President's Council on Environmental Quality a detailed statement on:

(1) The environmental impact of the proposed actions.

(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented.

(3) Alternatives to the proposed action.

(4) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(5) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. The District Engineer must determine whether such an Environmental Impact Statement (EIS) is required in connection with each permit application.

(b) *EIS procedures.* In addition to the procedures required by 33 CFR 209.410 (ER 1105-2-507), the following special procedures apply to the processing of permits involving the preparation of an EIS.

(1) The District Engineer, at the earliest practicable time prior to the issuance of the public notice, shall make a preliminary assessment of impacts of the project should it be approved and make a preliminary determination as to whether the quality of the human environment would be significantly affected. This preliminary assessment will normally be based on experience with similar type activities performed in the past. A statement of the District Engineer's preliminary determination shall be included in the public notice. This preliminary determination will be reconsidered as additional information is developed.

(2) If the District Engineer's final determination after consideration of all additional information developed (including responses to the public notice) is that the proposed work will not significantly affect the quality of the human environment, the District Engineer's determination shall be documented, dated, and placed in the record as his Environmental Assessment (see § 325.2(a)(4)).

(3) At such time as the District Engineer believes that a permit may be warranted but that the proposed activity would significantly affect the quality of the human environment, he will require the applicant to furnish any additional information that the District Engineer considers necessary to allow his preparation of an EIS. The applicant should also be advised at this time that there is no assurance that favorable action will ultimately be taken on his application. Additionally, if the District Engineer has previously announced a preliminary determination that no EIS would be required, he shall issue a supplemental public notice to advise the public of the changed determination. If the applicant is unable to furnish certain information considered by the District Engineer to be necessary for the EIS, the District Engineer may, afer obtaining written approval from the Division Engineer, charge the applicant pursuant to 31 U.S.C. 483(a) for those extraordinary expenses incurred by the Government in developing the information. All money so collected shall be paid into the Treasury of the United States as miscellaneous receipts. Otherwise the costs of the preparation and distribution of the EIS itself shall be borne by the Federal Government. In those cases when the determination has been made that an EIS will be required, the District Engineer shall consider inviting public comments as to specific factors of concern which should be addressed in the draft EIS. Upon preparation of the draft EIS, a public notice shall be issued summarizing the facts of the case and announcing the availability of the draft EIS. A copy of that notice shall be furnished to all recipients of the draft EIS including CEQ. If a public hearing is to be held pursuant to § 325.2(a)(5), the hearing may be held anytime after completion of the draft EIS.

(4) If another agency is the lead agency as defined by the CEQ guidelines (40 CFR 1500.7(b)) the District Engineer will coordinate with that agency to insure that the resulting EIS adequately describes the impact of the activity which is subject to

Corps permit authority. That previously prepared EIS will be referenced in the public notice announcing the permit application and a statement included that the effects of the proposed activity on the environment as outlined therein will be carefuly considered in the evaluation of the permit application.

(c) *Public notice on EIS filing.* The 30-day wait period required by the National Environmental Policy Act for issuing a permit for which an EIS has been prepared begins with notation in the FEDERAL REGISTER that the FEIS has been filed with CEQ or on the date of delivery to U.S. Postal Service facilities for mailing of copies of the FEIS to agencies, groups, and individuals on the project mailing list, whichever date is later. In order to notify the interested public of their opportunity to comment on the FEIS, the District Engineer shall issue a public notice when the filing notation has been published in the FEDERAL REGISTER to all parties receiving the original application notice or draft EIS and to all others who have expressed an interest in the application. The public notice should include:

(1) A brief summary of application (applicant, work, date of public notice, date of draft EIS release, date of public hearing, if held);

(2) Opportunity to comment to the District Engineer on the FEIS until the deadline date projected by the 30-day wait period;

(3) A statement that the comments received on the FEIS will be evaluated and considered in arriving at the final decision on the application; and

(4) Information on how interested parties can obtain or have access to the FEIS.

§ 325.5 Forms of authorization.

(a) *General.* (1) Department of the Army authorizations under this regulation shall be in the form of an individual permit, general permit, or letter of permission, as appropriate. The basic format shall be ENG Form 1721, Department of the Army Permit (Appendix A).

(2) While the general conditions included in ENG Form 1721 are normally applicable to all permits, some may not apply to certain authorizations (e.g., after-the-fact situations where work is completed, or situations in which the permittee is a Federal agency) and may be deleted by the issuing officer. Special conditions applicable to the specific activity will be included in the permit as necessary to protect the public interest.

(b) *Letters of permission.* In those cases subject to Section 10 of the River and Harbor Act of 1899 in which, in the opinion of the District Engineer, the proposed work is minor, will not have significant impact on environmental values, and should encounter no opposition, the District Engineer may omit the publishing of a public notice and authorize the work by a letter of permission. However, he will coordinate the proposal with all concerned fish and wildlife agencies, Federal and State, as required by the Fish and Wildlife Coordination Act. The letter of permission will not be used to authorize the discharge of dredged or fill material into waters of the United States nor the transportation of dredged material for purposes of dumping it in ocean waters. The letter of permission will be in letter form and will identify the permittee, the authorized work and location of the work, the statutory authority (i.e., 33 U.S.C. 403), any limitations on the work, a construction time limit and a requirement for a report of completed work. A copy of the general conditions from ENG Form 1721 will be attached and will be incorporated by reference into the letter of permission.

(c) *General permits.* The District Engineer may, after compliance with the other procedures of this regulation, issue general permits for certain clearly described categories of structures or work, including discharges of dredged or fill material, requiring Department of the Army permits. After a general permit has been issued, individual activities falling within those categories that are authorized by such general permits do not have to be further authorized by the procedures of this regulation unless the District Engineer determines, on a case-by-case basis, that the public interest requires.

(d) *Section 9 permits.* Permits for structures under Section 9 of the River and Harbor Act of 1899 will be drafted during review procedures at Department of the Army level.

(e) *Nationwide permits.* Nationwide permits mean Department of the Army authorizations that have been issued by the regulations for certain specified activities nationwide. If certain conditions are met, the specified activities can take place without the need for an individual or general permit.

§ 325.6 Duration of autorizations.

(a) *General.* Department of the Army authorization may authorize both the work and the resulting use. Authorizations continue in effect until they automatically expire or are modified, suspended, or revoked.

(b) *Structures.* Authorizations for the existence of a structure or other activity of a permanent nature are usually for an indefinite duration with no expiration date cited. However, where a temporary structure is authorized, or where restoration of a waterway is contemplated, the authorization will be of limited duration with a definite expiration date. Except as provided in subparagraph (e), below, permits for the discharge of dredged material in the waters of the United States or for the transportation of dredged material for the purpose of dumping it in ocean waters will be of limited duration with a definite expiration date.

(c) *Works.* Authorizations for construction work or other activity will specify time limits for accomplishing the work or activity. The time limits will specify a date by which the work must be started, normally one year from the date of issuance, and a date by which the work must be completed. The dates will be established by the issuing official and will provide reasonable times based on the scope and nature of the work involved. An authorization for work or other activity will automatically expire if the permitee fails to request an extension or revalidation.

(d) *Extensions of time.* Extensions of time may be granted by the District Engineer for authorizations of limited duration, or for the time limitations imposed for starting or completing the work or activity. The permittee must request the extension and explain the basis of the request, which will be granted only if the District Engineer determines that an extension is in the general public interest. Request for extensions will be processed in accordance with the regular procedures of § 325.2, including issuance of a public notice, except that such processing is not required where the District Engineer determines that there have been no significant changes in the attendant circumstances since the authorization was issued and that the work is proceeding essentially in accordance with the approved plans and conditions.

(e) *Periodic maintenance.* If the authorized work includes periodic maintenance dredging, and expiration date for the authorization of that maintenance dredging will be included in the permit. The expiration date, which in no event is to exceed ten years from the date of issuance of the permit, will be established by the issuing official after his evaluation of the proposed method of dredging and disposal of the dredged material in accordance with the requirements of 33 CFR Part 320 to 325. In such cases, the District Engineer shall require notification of the maintenance dredging prior to actual performance to insure continued compliance with the requirements of the regulation and 33 CFR Parts 320-324. If the permittee desires to continue maintenance dredging beyond the expiration date, he must request a revalidation of that portion of his permit which authorized the maintenance dredging. The request must be made to the District Engineer 6 months prior to the expiration date, and include full description of the proposed methods of dredging and disposal of dredged materials. The District Engineer will process the request for revalidation in accordance with the standard procedures including the issuance of a public notice describing the authorized work to be maintained and the proposed methods of maintenance.

§ 325.7 Modification, suspension or revocation of authorizations.

(a) *General.* The District Engineer may reevaluate the circumstance and conditions of a permit either on his own motion or as the result of periodic progress inspection, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the general public interest. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the activity authorized have changed since the permit was issued, extended or revalidated, and the continuing adequacy of the permit conditions; any significant objections to the activity authorized by the permit which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with Sec. 325.2, and not as modifications under this paragraph.

(b) *Modification.* The District Engineer, as a result of revaluation of the circumstances and conditions of a permit, may determine that protection of the general public interest requires a modification of the terms or conditions of the permit. In such cases, the District Engineer will hold informal consultations with the permittee to ascertain whether the terms and conditions can be modified by mutual agreement. If a mutual agreement is reached on modification of the terms and conditions of the permit, the District Engineer will give the permittee written notice of the modification, which will then become effective on such date as the District Engineer may establish, which in no event shall be less than ten days from its date of issuance. In the event a mutual agreement cannot be reached by the District Engineer and the permittee, the District Engineer will proceed in accordance with subparagraph (c), below, if immediate suspension is warranted. In cases where immediate suspension is not warranted but the District Engineer determines that the permit should be modified, he will notify the permittee of the proposed modification and reasons therefor, and that he may request a hearing. The modification will become effective on the date set by the District Engineer which shall be at least ten days after receipt of the notice unless a hearing is requested within that period. If the permittee fails or refuses to comply with the modification, the District Engineer will proceed in accordance with 33 CFR Part 326.

(c) *Suspension.* The District Engineer may suspend a permit after preparing a written determination and finding that immediate suspension would be in the general public interest. The District Engineer will notify the permittee in writing by the most expeditious means available that the permit has been suspended with the reasons therefor, and order the permittee to stop all previously authorized activities. The permittee will also be advised that following this suspension a decision will be made to either reinstate, modify, or revoke the permit, and that he may request a hearing within 10 days of receipt of notice of the suspension to present information in this matter. If a hearing is requested the procedures prescribed in 33 CFR 327 will be followed. After the completion of the hearing (or within a reasonable period of time after issuance of the notice to the permittee that the permit has been suspended if no hearing is requested), the District Engineer will take action to reinstate the permit, modify the permit, or recommend revocation of the permit in accordance with subparagraph (d), below.

(d) *Revocation.* Following completion of the suspension procedures in subparagraph (c), above, if revocation of the permit is recommended, the District Engineer will prepare a report of the circumstances and forward it together with the record of the suspension proceedings to DAEN-CWO-N. The Chief of Engineers may, prior to deciding whether or not to revoke the permit, afford the permittee the opportunity to present any additional information not made available to the District Engineer at the time he made the recommendation to revoke the permit including, where appropriate, the means by which he intends to comply with the terms and conditions of the permit. The permittee will be advised in writing of the final decision.

§ 325.8 Authority to issue or deny authorizations.

(a) *General.* Except as otherwise provided in this regulation, the Secretary of the Army subject to such conditions as he or his authorized representative may from time to time impose, has authorized the Chief of Engineers and his authorized representatives to issue or deny authorizations for construction or other work in or affecting navigable waters of the United States pursuant to Sections 10 and 14 of the Act of March 3, 1899, and Section 1 of the Act of June 13, 1902. He also has authorized the Chief of Engineers and his authorized representatives to issue or deny authorizations for the discharge of dredged or fill material in waters of the United States pursuant to Section 404 of the Federal Water Pollution Control Act Amendments of 1972 or for the transportation of dredged material for the purpose of dumping it into ocean waters pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended. The authority to issue or deny permits pursuant to Section 9 of the River and Harbor Act of March 3, 1899 has not been delegated to the Chief of Engineers or his authorized representatives.

(b) *District Engineer's authority.* District Engineers are authorized to issue in accordance with this regulation permits and letters of permission which are subject to such special conditions as are necessary to protect the public interest in the waters of the United States or ocean waters pursuant to Sections 10 and 14 of the River and Harbor Act of March 3, 1899; Section 1 of the River and Harbor Act of June 13, 1902; Section 404 of the Federal Water Pollution Control Act Amendments of 1972; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, in all cases in which there are no known substantive objections to the proposed work or activity or in which objections have been resolved to the satisfaction of the District Engineer. Unless otherwise precluded by this regulation. District Engineers may issue permits over an unresolved objection of another Federal agency if that agency indicates to the District Engineer that it does not desire to refer the application to a higher level of authority for review. It is essential to the legality of a permit that it contain the name of the district Engineer as the issuing officer. However, the permit need not be signed by the District Engineer, in person; but may be signed for and in behalf of him by whoever he designates. District Engineers shall deny permits when required State or local authorization and/or certification has been denied or when a State has objected to a required certification of compliance with its coastal zone management program and the Secretary of Commerce has not reviewed the action and reached a contrary finding. A District Engineer may also deny any permit if he determines that the proposed activity is not in the public interest provided the referral requirements of § 325.8(d) below are not applicable. In such cases the Findings of Fact should be in the general format required for reports under § 325.11 and must conclusively justify a denial decision. All other permit applications including those cases in § 325.7 (c) and (d) below will be referred to Division Engineers. District Engineers are also authorized to add, modify, or delete special conditions in permits, except for those conditions which have been imposed by higher authority, and to suspend permits according to the procedures of § 325.7(c).

(c) *Division Engineer's authority.* Division Engineers will review, attempt to resolve outstanding matters, and evaluate all permit applications referred by District Engineers. Division Engineers may authorize the issuance or denial of permits pursuant to Sections 10 and 14 of the River and Harbor Act of March 3, 1899; Section 1 of the River Harbor Act of June 13, 1902, Section 404 of the Federal Water Pollution Control Act Amendments of 1972; and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended; and the inclusion of conditions to those permits as may be necessary to protect the public interest in waters of the United States or ocean waters in accordance with the policies cited in this regulation. Except as provided in subparagraph (d), below, if the Division Engineer determines that issuance of a permit with or without conditions is in the public interest, but there is continuing objection to the issuance of the permit by another Federal agency, he shall advise the regional representative of that Federal agency of his intent to issue the permit. The Division Engineer shall not proceed with the issuance of a permit if, within 15 days after the date of this notice of intent to issue a permit, an authorized representative of that Federal agency indicates to the Division Engineer in writing that he wishes to bring his concerns to the departmental level and has departmental concurrence to do so. In such cases, the proposed permit will be forwarded to higher authority for resolution. thereafter, a permit will be issued only pursuant to and in accordance with instructions from such higher authority. Every effort should be made to resolve differences at the Division Engineer level before referring the matter to higher authority.

(d) *Referral to the Chief of Engineers.* Division Engineers will refer to the Chief of Engineers the following cases:

(1) When it is proposed to issue a permit and there are unresolved objections from another Federal agency which must be handled under special procedures specified in statutes or Memoranda of Understanding which thereby preclude final resolution by the Division Engineer;

(2) When the recommended decision is contrary to the stated position of the Governor of the State in which the work is to be performed;

(3) When there is substantial doubt as to authority, law, regulations, or policies applicable to the proposed activity;

(4) When the Chief of Engineers requests the case be forwarded for decision;

(5) When the proposed activity would affect the baseline used for determination of the limits of the territorial sea; and

(6) When Section 9 of the River and Harbor Act of 1899 authority is involved.

§ 325.9 Supervision and enforcement.

(a) *Inspection and monitoring.* District Engineers will assure that authorized activities are conducted and executed in conformance with approved plans and other conditions of the permits. Appropriate inspections should be made on timely occasions during performance of the activity and appropriate notices and instructions given permittees to insure that they do not depart from the approved plans. Revaluation of permits to assure compliance with its purposes and conditions will be carried out as provided in § 325.7. If there are approved material departures from the authorized plans, the District Engineer will require the permittee to furnish corrected plans showing the activity as actually performed.

(b) *Non-compliance.* Where the District Engineer determines that there has been non-compliance with the terms or conditions of a permit, he should first contact the permittee and attempt to resolve the problem. If a mutually agreeable resolution cannot be reached, a written demand for compliance will be made. If the permittee has not agreed to comply within 5 days of receipt of the demand, the District Engineer will issue an immediately effective notice of suspension in accordance with § 325.7(c) and consider initiation of appropriate legal action.

(c) *Surveillance.* For purposes of inspection or permitted activities and for surveillance of the waters of the United States for enforcement of the permit authorities the District Engineer will use all means at his disposal. All Corps of Engineers employees will be instructed to observe and report all activities in waters of the United

States which would require permits. The assistance of members of the public and personnel of other interested Federal, State, and local agencies to observe and report such activities will be encouraged. To facilitate this surveillance, the District Engineer will, in appropriate cases, require a copy of ENG Form 4336 to be posted conspicuously at the site of authorized activities and will make available to all interested persons information on the scope of authorized activities and the conditions prescribed in the authorizations. Furthermore, significant actions taken under § 325.7 will be brought to the attention of those Federal, State, and local agencies and other persons who express particular interest in the affected activity. Surveillance in ocean waters will be accomplished primarily by the Coast Guard pursuant to section 107(c) of the Marine Protection, Research and Sanctuaries Act of 1972, as amended.

(d) *Inspection expenses.* The expenses incurred in connection with the inspection of permitted activity in waters of the United States normally will be paid by the Federal Government in accordance with the provisions of section 6 of the River and Harbor Act of March 3, 1905 (33 U.S.C. 417) unless daily supervision or other unusual expenses are involved. In such unusual cases, and after approval by the Division Engineer, the permittee will be required to bear the expense of inspections in accordance with the conditions of his permit; however, the permittee will not be required or permitted to pay the United States inspector either directly or through the District Engineer. The inspector will be paid on regular payrolls or service vouchers. The District Engineer will collect the cost from the permittee in accordance with following:

(1) At the end of each month the amount chargeable for the cost of inspection pertaining to the permit will be collected from the permittee and will be taken up on the statement of accountability and deposited in a designated depository to the credit of the Treasurer of the United States, on account of reimbursement of the appropriation from which the expenses of the inspection were paid.

(2) If the District Engineer considers such a procedure necessary to insure the United States against loss through possible failure of the permittee to supply the necessary funds in accordance with subparagraph (1), above, he may require the permittee to keep on deposit with the District Engineer at all times an amount equal to the estimated cost of inspection and supervison for the ensuing month, such deposit preferably being in the form of a certified check, payable to the order of Treasurer of the United States. Certified checks so deposited will be carried in a special deposit account (guaranty for inspection expenses) and upon completion of the work under the permit the funds will be returned to the permittee provided he has paid the actual cost of inspection.

(3) On completion of work under a permit, and the payment of expenses by the permittee without protest, the account will be closed, and outstanding deposits returned to the permittee. If the account is protested by the permitte, it will be referred to the Division Engineer for approval before it is closed and before any deposits are returned to the permittee.

(e) *Bonds.* If the permitted activity includes restoration of the waterway to its original conditions, or if the issuring official has reason to consider that the permittee might be prevented from completing work which is necessary to protect the public interest in the waterway, he may require the permittee to post a bond of sufficient amount to indemnify the government against any loss as a result of corrective action it might take.

§ 325.10 Publicity.

The District Engineer will establish and maintain a program to assure that potential applicants for permits are informed of the requirements of this regulation and of the steps required to obtain permits for activities in navigable waters or ocean waters. Whenever the District Engineer becomes aware of plans being developed by either private or public entities who might require permits in order to implement the plans, he will advise the potential applicant in writing of the statutory requirements and the provisions of this regulation. Similarly when the District Engineer is aware of changes in Corps of Engineers regulatory jurisdiction, he will issue appropriate public notices.

§ 325.11 Reports.

The report of a District Engineer on an application for a permit requiring action by the Division Engineer or by the Chief of Engineers will be in a letter form with the application and all pertinent comments, records, photographs, maps, and studies including the final Enivronmental Impact Statement if prepared, as inclosures. The inclosures for all cases referred to the Chief of Engineers will be in duplicate. If an EIS has been prepared, the report shall not be forwarded until expiration of the 30-day comment period following filing of the final EIS and shall address any comments received on the final EIS. The following items will be included or discussed in the report:

(a) Name of applicant.

(b) Location, character and purpose of proposed activity, including a description of any wetlands involved.

(c) Applicable statutory authorities and administrative determinations conferring Corps of Engineers regulatory jurisdiction.

(d) Other Federal, State, and local authorizations obtained or required and pending.

(e) Date of public notice and public hearings, if held, and summary of objections offered with comments of the District Engineer thereon. The comments should explain the objections and not merely refer to inclosed letters.

(f) Views of State and local authorities.

(g) Views of District Engineer concerning probable effect of the proposed work on:

(1) Navigation, present and prospective.

(2) Harbor lines, if established.

(3) Flood heights, drift and flood damage protection.

(4) Beach erosion or accretion.

(5) Fish and Wildlife.

(6) Water Quality.

(7) Aesthetics.

(8) Historic values.

(9) Recreation.

(10) Economy.

(11) Water supply.

(12) Energy needs.

(13) Land use classification and coastal zone mangement plans.

(h) Other pertinent remarks, such as:

(1) Extent of public and private need.

(2) Appropriate alternatives.

(3) Extent and permanence of beneficial and/or detrimental effects.

(4) Probable impact in relation to cumulative effects created by other activities.

(i) A copy of the environmental assessment or the Environmental Impact Statement. If an EIS is prepared, a summary of comments received on the final EIS together with the District Engineer's response to those comments.

(j) A discussion of conformity with the guidelines published for the discharge of dredged or fill material in waters of the United states (40 CFR Part 230) or the dumping of dredged material in ocean waters (40 CFR Parts 220 to 229), as applicable.

(k) Conclusions.

(l) Recommendations including any proposed special conditions.

APPENDIX A—PERMIT FORM

Application No. ——————————
Name of Applicant ——————————
Effective Date ——————————
Expiration Date (if applicable) ————————

DEPARTMENT OF THE ARMY

Permit

Referring to written request dated——— for a permit to:

( ) Perform work in or affecting navigable waters of the United States upon the recommendation of the Chief of Engineers, pursuant to Section 10 of the Rivers and Harbor Act of March 3, 1899 (33 U.S.C. 403);

( ) Discharge dredged or fill material into waters of the United States upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 404 of the Federal Water Pollution Control Act (86 Stat. 816, Pub. L. 92-500);

( ) Transport dredged material for the purpose of dumping it into ocean waters upon the issuance of a permit from the Secretary of the Army acting through the Chief of Engineers pursuant to Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (86 Stat. 1052; Pub. L. 92-532);

____

____

(Here insert the full name and address of the permittee.)

is hereby authorized by the Secretary of the Army:

to ______________________________

____

____

____

____

____

(Here describe the proposed structure or activity, and its intended use. In the case of an application for a fill permit, describe the structures, if any proposed to be erected on the fill. In the case of an application for the discharge of dredged or fill material into waters of the United States or the transportation for discharge in ocean waters of dredged material, describe the type and quantity of material to be discharged.)

in ______________________________

____

____

____

____

____

____

Here to be named the ocean, river, harbor, or waterway concerned.)

at ______________________________

____

____

____

____

____

____

(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving direction by points of compass.)

in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit (on drawings; give file number or other definite identification marks), subject to the following conditions:

I. General conditions: (a) That all activities identified and authorized herein shall be consistent with the terms and conditions of this permit; and that any activities not specifically identified and authorized herein shall constitute a violation of the terms and conditions of this permit which may result in the modification, suspension or revocation of this permit, in whole or in part, as set forth more specifically in General Conditions j or k hereto, and in the institution of such legal proceedings as the United States Government may consider appropriate, whether or not this permit has been previously modified, suspended or revoked in whole or in part.

(b) That all activities authorized herein shall, if they involve, during their construction or operation, any discharge of pollutants into waters of the United States or ocean waters, be at all times consistent with applicable water quality standards, effluent limitations and standards of performance, prohibitions, pretreatment standards and management practices established pursuant to the Federal Water Pollution Control Act of 1972 (Pub. L. 92-500; 86 Stat. 816), the Marine Protection, Research and Sanctuaries Act of 1972 (Pub. L. 92-532, 86 Stat. 1052), or pursuant to applicable State and local law.

(c) That when the activity authorized herein involves a discharge during its construction or operation, of any pollutant (including dredged or fill material), into waters of the United States, the authorized activity shall, if applicable water quality standards are revised or modified during the term of this permit, be modified, if necessary, to conform with such revised or modified water quality standards within 6 months of the effective date of any revision or modification of water quality standards, or as directed by an implementation plan contained in such revised or modified standards, or within such longer period of time as the District Engineer, in consultation with the Regional Administrator of the Environmental Protection Agency, may determine to be reasonable under the circumstances.

(d) That the discharge will not destroy a threatened or endangered species as identified under the Endangered Species Act, or endanger the critical habitat of such species.

(e) That the permittee agrees to make every reasonable effort to prosecute the construction or operation of the work authorized herein in a manner so as to minimize any adverse impact on fish, wildlife, and natural environmental values.

(f) That the permittee agrees that it will prosecute the construction or work authorized herein in a manner so as to minimize any degradation of water quality.

(g) That the permittee shall permit the District Engineer or his authorized representative(s) or designee(s) to make periodic inspections at any time deemed necessary in order to assure that the activity being performed under authority of this permit is in accordance with the terms and conditions prescribed herein.

(h) That the permittee shall maintain the structure or work authorized herein in good condition and in accordance with the plans and drawings attached hereto.

(i) That this permit does not convey any property rights, either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to property or invasion of rights or any infringement of Federal, State, or local laws or regulations nor does it obviate the requirement to obtain State or local assent required by law for the activity authorized herein.

(j) That this permit may be summarily suspended, in whole or in part, upon a finding by the District Engineer that immediate suspension of the activity authorized herein would be in the general public interest. Such suspension shall be effective upon receipt by the permittee of a written notice thereof which shall indicate (1) the extent of the suspension, (2) the reasons for this action, and (3) any corrective or preventative measures to be taken by the permittee which are deemed necessary by the District Engineer to abate imminent hazards to the general public interest. The permittee shall take immediate action to comply with the provisions of this notice. Within ten days following receipt of this notice of suspension, the permittee may request a hearing in order to present information relevent to a decision as to whether his permit should be reinstated, modified or revoked. If a hearing is requested, it shall be conducted pursuant to procedures prescribed by the Chief of Engineers. After completion of the hearing, or within a reasonable time after issuance of the suspension notice to the permittee if no hearing is requested, the permit will either be reinstated, modified or revoked.

(k) That this permit may be either modified, suspended or revoked in whole or in part if the Secretary of the Army or his authorized representative determines that there has been a violation of any of the terms or conditions of this permit or that such action would otherwise be in the public interest. Any such modification, suspension, or revocation shall become effective 30 days after receipt by the permittee of written notice of such action which shall specify the facts or conduct warranting same unless (1) within the 30-day period the permittee is able to satisfactorily demonstrate that (a) the alleged violation of the terms and the conditions of this permit did not, in fact, occur or (b) the alleged violation was accidental, and the permittee has been operating in compliance with the terms and conditions of the permit and is able to provide satisfactory assurances that future operations shall be in full compliance with the terms and conditions of this permit; or (2) within the aforesaid 30-day period, the permittee requests that a public hearing be held to present oral and written evidence concerning the proposed modification, suspension or revocation. The conduct of this hearing and the procedures for making a final decision either to modify, suspend or revoke this permit in whole or in part shall be pursuant to procedures prescribed by the Chief of Engineers.

(l) That in issuing this permit, the Government has relied on the information and data which the permittee has provided in connection with his permit application. If subsequent to the issuance of this permit, such information and data prove to be false, incomplete or inaccurate, this permit may be modified, suspended or revoked, in whole or in part, and/or the Government may, in addition, institute appropriate legal proceedings.

(m) That any modification, suspension, or revocation of this permit shall not be the basis for any claim for damages against the United States.

(n) That the permittee shall notify the District Engineer at what time the activity authorized herein will be commenced, as far in advance of the time of commencement as the District Engineer may specify, and of any suspension of work, if for a period of more than one week, resumption of work and its completion.

(o) That if the activity authorized herein is not started on or before ——— day of ———, 19—, (one year from the date of issuance of this permit unless otherwise specified) and is not completed on or before ———— day of ————, 19—, (three years from the date of issuance of this permit unless otherwise specified) this permit, if not previously revoked or specifically extended, shall automatically expire.

(p) That this permit does not authorize or approve the construction of particular structures, the authorization or approval of which may require authorization by the Congress or other agencies of the Federal Government.

(q) That if and when the permittee desires to abandon the activity authorized herein, unless such abandonment is part of a transfer procedure by which the permittee is transferring his interests herein to a third party pursuant to General Condition S hereof, he must restore the area to a condition satisfactory to the District Engineer.

(r) That if the recording of this permit is possible under applicable State or local law, the permittee shall take such action as may be necessary to record this permit with the Register of Deeds or other appropriate official charged with the responsibility for maintaining records of title to and interests in real property.

(s) That there shall be no unreasonable interference with navigation by the existence or use of the activity authorized herein.

(t) That this permit may not be transferred to a third party without prior written notice to the District Engineer, either by the transferee's written agreeement to comply with all terms and conditions of this permit or by the transferee subscribing to this permit in the space provided below and thereby agreeing to comply with all terms and conditions of this permit. In addition, if the permittee transfers the interests authorized herein by conveyance of realty, the deed shall reference this permit and the terms and conditions specified herein and this permit shall be recorded along with the deed with the Register of Deeds or other appropriate official.

II. Special Conditions: Here list conditions relating specifically to the proposed structure or work authorized by this permit. The following Special Conditions will be applicable when appropriate:

Structures In or Affecting Navigable Waters of the United States

(a) That this permit does not authorize the interference with any existing or proposed Federal project and that the permittee shall not be entitled to compensation for damage or injury to the structures or work authorized herein which may be caused by or result from existing or future operations undertaken by the United States in the public interest.

(b) That no attempt shall be made by the permittee to prevent the full and free use by the public of all navigable waters at or adjacent to the activity authorized by this permit.

(c) That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.

(d) That the permittee, upon receipt of a notice of revocation of this permit or upon its expiration before completion of the authorized structure or work, shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. If the permittee fails to comply with the direction of the Secretary of the Army or his authorized representative, the Secretary or his designee may restore the waterway to its former condition, by contract or otherwise, and recover the cost thereof from the permittee.

(e) Structures for Small Boats: That permittee hereby recognizes the possibility that the structure permitted herein may be subject to damage by wave wash from passing vessels. The issuance of this permit does not relieve the permittee from taking all proper steps to insure the integrity of the structure permitted herein and the safety of boats moored thereto from damage by wave wash and the permittee shall not hold the United States liable for any such damage.

Maintenance Dredging

(a) That when the work authorized herein includes periodic maintenance dredging, it may be performed under this permit for ——— years from the date of issuance of this permit (ten years unless otherwise indicated);

(b) That the permittee will advise the District Engineer in writing at least two weeks before he intends to undertake any maintenance dredging.

Discharges of Dredged or Fill Material Into Waters of the United States

(a) That the discharge will be carried out in conformity with the goals and objectives of the EPA Guidelines established pursuant to Section 404(b) of the FWPCA and published in 40 CFR 230;

(b) That the discharge will consist of suitable material free from toxic pollutants in other than trace quantities;

(c) That the fill created by the discharge will be properly maintained to prevent erosion and other non-point sources of pollution; and

(d) That the discharge will not occur in a component of the National Wild and Scenic River System or in a component of a State wild and scenic river system.

Dumping of Dredged Material Into Ocean Waters

(a) That the dumping will be carried out in conformity with the goals, objectives, and requirements of the EPA criteria established pursuant to Section 102 of the Marine Protection, Research and Sanctuaries Act of 1972, published in 40 CFR 220-228.

(b) That the permittee shall place a copy of this permit in a conspicuous place in the vessel to be used for the transportation and/or dumping of the dredged material as authorized herein.

This permit shall become effective on the date of the District Engineer's signature.

Permittee hereby accepts and agrees to comply with the terms and conditions of this permit.

____

(Permittee)

____

(Date)

By authority of the Secretary of the Army:

____

(District Engineer)

____

(Date)

Transferee hereby agrees to comply with the terms and conditions of this permit.

____

(Transferee)

____

(Date)

APPENDIX B—MEMORANDUM OF UNDERSTANDING BETWEEN THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF THE ARMY

In recognition of the responsibilities of the Secretary of the Army under sections 10 and 13 of the Act of March 3, 1899 (33 U.S.C. 403 and 407), relating to the control of dredging, filling, and excavation in the navigable waters of the United States, and the control of refuse in such waters, and the interrelationship of those responsibilities with the responsibilities of the Secretary of the Interior under the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 et seq.), the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661-666c), and the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a et seq.), relating to the control and prevention of water pollution in such waters and the conservation of the Nation's natural resources and related environment, including fish and wildlife and recreational values therein; in recognition of our joint responsibilities under Executive Order No. 11288 to improve water quality through the prevention, control, and abatement of water pollution from Federal and federally licensed activities; and in recognition of other provisions of law and policy, we, the two Secretaries, adopt the following policies and procedures:

POLICIES

1. It is the policy of the two Secretaries that there shall be full coordination and cooperation between their respective Departments on the above responsibilities at all organizational levels, and it is their view that maximum efforts in the discharge of those responsibilities, including the resolution of differing views, must be undertaken at the earliest practicable time and at the field organizational unit most directly concerned. Accordingly, District Engineers of the U.S. Army Corps of Engineers shall coordinate with the Regional Directors of the Secretary of the Interior on fish and wildlife, recreation, and pollution problems associated with dredging, filling, and excavation operations to be conducted under permits issued under the 1899 Act in the navigable waters of the United States, and they shall avail themselves of the technical advice and assistance which such Directors may provide.

2. The Secretary of the Army will seek the advise and counsel of the Secretary of the Interior on difficult cases. If the Secretary of the Interior advises that proposed operations will unreasonably impair natural resources or the related environment, including the fish and wildlife and recreational values thereof, or will reduce the quality of such waters in violation of applicable water quality standards, the Secretary of the Army in acting on the request for a permit will carefully evaluate the advantages and benefits of the operations in relation to the resultant loss or damage, including all data presented by the Secretary of the Interior, and will either deny the permit or include such conditions in the permit as he determines to be in the public interest, including provisions that will assure compliance with water quality standards established in accordance with law.

PROCEDURES FOR CARRYING OUT THESE POLICIES

1. Upon receipt of an application for a permit for dredging, filling, excavation, or other related work in navigable waters of the United States, the District Engineers shall send notices to all interested parties,

including the appropriate Regional Directors of the Federal Water Pollution Control Administration, the United States Fish and Wildlife Service, and the National Park Service of the Department of the Interior, and the appropriate State conservation, resources, and water pollution agencies.

2. Such Regional Directors of the Secretary of the Interior shall immediately make such studies and investigations as they deem necessary or desirable, consult with the appropriate State agencies, and advise the District Engineers whether the work proposed by the permit applicant, including the deposit of any material in or near the navigable waters of the United States, will reduce the quality of such waters in violation of applicable water quality standards or unreasonably impair natural resources or the related environment.

3. The District Engineer will hold public hearings on permit applications whenever response to a public notice indicates that hearings are desirable to afford all interested parties full opportunity to be heard on objections raised.

4. The District Engineer, in deciding whether a permit should be issued, shall weigh all relevant factors in reaching his decision. In any case where Directors of the Secretary of the Interior advise the District Engineers that proposed work will impair the water quality in violation of applicable water quality standards or unreasonably impair the natural resources or the related environment, he shall, within the limits of his responsibility, encourage the applicant to take steps that will resolve the objections to the work. Failing in this respect, the District Engineer shall forward the case for the consideration of the Chief of Engineers and the appropriate Regional Director of the Secretary of the Interior shall submit his views and recommendations to his agency's Washington headquarters.

5. The Chief of Engineers shall refer to the Under Secretary of the Interior all those cases referred to him containing unresolved substantive differences of views and he shall include his analysis thereof, for the purpose of obtaining the Department of Interior's comments prior to final determination of the issues.

6. In those cases where the Chief of Engineers and the Under Secretary are unable to resolve the remaining issues, the cases will be referred to the Secretary of the Army for decision in consultation with the Secretary of the Interior.

7. If in the course of operations within this understanding, either Secretary finds its terms in need of modification, he may notify the other of the nature of the desired changes. In that event the Secretaries shall within 90 days negotiate such amendment as is considered desirable or may agree upon termination of this understanding at the end of the period.

Dated: July 13, 1967.

STEWART L. UDALL,
Secretary of the Interior.

Dated: July 13, 1967.

STANLEY RESOR,
Secretary of the Army.

PART 326—ENFORCEMENT

Sec.
326.1 Purpose.
326.2 Discovery of unauthorized activity in progress.
326.3 Investigation.
326.4 Legal action.
326.5 Processing after-the-fact applications.

AUTHORITY: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413.

SOURCE: 42 FR 37158, July 19, 1977, unless othewise noted.

§ 326.1 Purpose.

This regulation prescribes the policy, practice, and procedures to be followed by the Corps of Engineers in connection with activities requiring Department of the Army permits that are performed without prior authorization.

§ 326.2 Discovery of unauthorized activity in progress.

When the District Engineer becomes aware of any unauthorized activity which is still in progress, he shall immediately issue a cease and desist order to all persons responsible for and/or involved in the performance of the activity. If appropriate, the District Engineer may also order interim protective measures to be taken in order to protect the public interest.

§ 326.3 Investigation.

The District Engineer shall commence an immediate investigation of all unauthorized activities brought to his attention to ascertain the facts surrounding the activity. In making this investigation, the District Engineer shall solicit the views of the Regional Adminstrator of the Environmental Protection Agency, the Regional Director of the U.S. Fish and Wildlife Service, and the Regional Di-

TAB D
FLOODPLAIN/WETLANDS

federal register

WEDNESDAY, MARCH 7, 1979

PART IV

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934

DEPARTMENT OF ENERGY

◆

COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS

[6450-01-M]

Title 10—Energy

CHAPTER X—DEPARTMENT OF ENERGY (GENERAL PROVISIONS)

PART 1022—COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS

AGENCY: Department of Energy.

ACTION: Final rulemaking.

SUMMARY: The Department of Energy (DOE) hereby establishes Part 1022 of Chapter X of title 10 of the Code of Federal Regulations, providing for compliance with Executive Order (E.O.) 11988—Floodplain Management, and E.O. 11990—Protection of Wetlands.

The regulations are applicable to all organizational units of DOE, except the Federal Energy Regulatory Commission (FERC), and are designed to be coordinated with the environmental review requirements established pursuant to the National Environmental Policy Act (NEPA). The final regulations published herein contain certain revisions to the proposed regulations, published in the FEDERAL REGISTER on July 19, 1978 (43 FR 31108), based on DOE's consideration of comments received.

EFFECTIVE DATE: March 7, 1979.

FOR FURTHER INFORMATION CONTACT:

Dr. Robert J. Stern, Acting Director, NEPA Affairs Division, Office of the Assistant Secretary for Environment, Room 6229, 20 Massachusetts Avenue, N.W., Washington, D.C. 20545, 202-376-5998.

Mr. Stephen H. Greenleigh, Acting Assistant General Counsel for Environment, Room 8217, 20 Massachusetts Avenue, N.W., Washington, D.C. 20545, 202-376-4266.

SUPPLEMENTARY INFORMATION:

I. Background
II. Comments Received
III. DOE Response
IV. Effective Date

I. BACKGROUND

On July 19, 1978, DOE published in the FEDERAL REGISTER (43 FR 31108) a notice of proposed rulemaking to establish 10 CFR Part 1022, DOE regulations for compliance with floodplain/wetlands environmental review requirements. The proposed regulations were drafted in response to Executive Orders 11988 and 11990 regarding floodplain management and wetlands protection, respectively, which were issued on May 24, 1977. The regulations were proposed to be applicable to all organizational units of DOE, except the FERC.

A public hearing was scheduled to be held on August 17, 1978, but only one request to speak was received. The hearing was cancelled by subsequent notice in the FEDERAL REGISTER, and the requesting party, the Sierra Club, met informally with DOE representatives to discuss its views on the proposed regulations. The formal comment period closed on August 28, 1978; DOE has, however, considered late comments in the preparation of these final regulations.

II. COMMENTS RECEIVED

Written comments were received from 12 organizations and agencies, including the Department of the Interior (DOI), Army Corps of Engineers, Environmental Protection Agency (EPA), Water Resources Council (WRC), Federal Insurance Administration (FIA), Council on Environmental Quality (CEQ), Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, Georgia State Department of Planning and Budget, State of Vermont Agency of Environmental Conservation, and Marathon Oil Company.

DOE has carefully considered all comments received, and has modified the proposed regulations, as appropriate, to assure that the final regulations represent sound policy and procedures for floodplain management and wetlands protection. DOE's analysis and treatment of the major substantive comments are summarized below.

III. DOE RESPONSE

A. RELATIONSHIP TO DOE NEPA PROCEDURES AND CEQ NEPA REGULATIONS

In accordance with the intent of both Executive orders that Federal agencies implement the floodplain/wetlands requirements through existing procedures, such as those established to implement NEPA, DOE designed its proposed floodplain/wetlands regulations to be implemented in conjuction with its proposed regulations for compliance with NEPA, originally intended to be codified at 10 CFR Part 1021 (FEDERAL REGISTER, February 21, 1978). Several commenters questioned the relationship of the floodplain/wetlands regulations to the NEPA regulations, given the fact that the DOE NEPA regulations had not been promulgated.

DOE had intended to finalize 10 CFR Part 1021 prior to the promulgation of floodplain/wetlands regulations. However, due to the recent publication of final CEQ NEPA regulations (FEDERAL REGISTER, November 29, 1978), DOE no longer intends to finalize the rules which were proposed in February. Instead, DOE is preparing implementing procedures as required by the CEQ NEPA regulations. The basic approach of coordinating the floodplain/wetlands review procedures with existing (and future) DOE NEPA procedures remains intact. However, specific references to 10 CFR Part 1021 have been deleted. In addition, DOE has modified certain floodplain/wetlands requirements and definitions of NEPA documentation used herein to be consistent with the CEQ NEPA regulations and the anticipated DOE NEPA procedures.

A related comment pertained to the administrative framework for assuring DOE compliance with its floodplain/wetlands responsibilities. DOE intends to utilize the internal framework established with respect to NEPA compliance to fulfill its floodplain/wetlands responsibilities. Such internal authorities and responsibilities are embodied in internal DOE Orders and memoranda and are not included in these regulations, in order to maintain necessary flexibility. To address this concern, however, a new provision (§ 1022.18) has been added to identify the Assistant Secretary for Environment as the central point of contact for inquiries concerning DOE's floodplain/wetlands activities.

B. DETAILED STANDARDS AND PROCEDURES

In combined comments, WRC, CEQ, and FIA suggested that the final regulations establish "specific standards" for key substantive and procedural requirements of the floodplains Order. For example, it was suggested that specific standards be provided with respect to what constitutes a "practicable alternative" to siting in a floodplain. DOI also commented that the "spirit and intent" of the two Orders requires "considerably more details" in agency procedures "to provide a higher level of consideration to the natural and beneficial values of floodplains and wetlands."

While DOE is sympathetic to the goals expressed in these comments, it believes that the evaluation of floodplain/wetlands impacts is inherently site-specific in nature, and that the determination of what constitutes a "practicable alternative" can only be made after balancing relevant factors on a case-by-case basis. DOE believes that these regulations adequately provide the framework within which this process can take place, and that these regulations, as revised, fully satisfy the requirements of both Executive orders. Additional detailed guidance will be provided, as appropriate, through internal DOE Orders, guidelines and memoranda.

C. DEFINITIONS

Several comments were received regarding DOE's definitions of terms (§ 1022.4), which differed somewhat from the definitions set forth in WRC's Floodplain Management Guidelines (40 FR 6030, February 10, 1978). Two commenters objected to the definition of "action" as "any DOE activity," and suggested that DOE adopt WRC's definition, which specifies the kinds of activities covered by the term "action." DOE had included such language in the applicability section [§ 1022.5(d)] of the proposed regulations. Moreover, it was felt that the DOE definition of action assured broad application of the floodplain/wetlands review requirements. Nevertheless, to alleviate this concern, DOE has restructured the regulations so as to include the WRC language in the definition of "action."

Several commenters objected to DOE's definition of "minimize" as "to reduce to the smallest degree practicable," again suggesting that DOE use the WRC definition, i.e., "to reduce to the smallest degree." DOE believes that its definition is justified, and notes that the WRC Guidelines explain that:

> while minimize means to reduce to the smallest amount or degree, there is an implicit acceptance of practical limitations. Agencies are required to use all *practicable* (WRC's emphasis) means and measures to minimize harm. The Order does not expect agencies to employ unworkable means to meet this goal.

In light of the WRC qualification and to avoid possible confusion concerning the intended meaning of "minimize," DOE believes it is appropriate to reaffirm the practicable nature of the term "minimize" in its definition.

Another commenter objected to DOE's addition of implementation time to WRC's definition of "practicable." The WRC Guidelines listed cost, environment and technology as pertinent factors in judging practicability. In DOE's view, implementation time is an appropriate consideration in determining practicability since it may bear directly on the achievement of program objectives. Accordingly, implementation time has been retained in the definition of "practicable."

WRC expressed particular concern over the variance in DOE's definition of "floodplain." In response to this and similar comments, DOE has modified its definitions of "floodplain," "structure," and "flood or flooding" to conform with WRC's definitions.

In order to be consistent with the terminology established in the CEQ NEPA regulations, DOE has eliminated the term "Negative Determination" (a public notice that no environmental impact statement (EIS) will be prepared) from these regulations and substituted the term "Finding of No Significant Impact" (FONSI), which is used in 40 CFR Part 1500. Until the effective date of the CEQ regulations, a Negative Determination prepared pursuant to currently applicable DOE NEPA regulations will be considered synonymous with the FONSI used herein. Similarly, the definition of an environmental assessment (EA) for purposes of these regulations, has been modified to conform with the CEQ definition.

D. APPLICABILITY

Several commenters questioned the exclusion of FERC from the applicability of these regulations [§ 1022.4(a)]. In this regard, it should be noted that FERC is an independent regulatory commission within DOE and is not "subject to the supervision or direction of any officer, employee, or agent of any other part of the Department" (DOE Organization Act, 42 USC 7171). FERC has indicated its intention to incorporate floodplain/wetlands considerations into its NEPA compliance process, which is also administered independently from that of DOE.

Other commenters questioned DOE's application of the regulations to floodplain/wetlands actions "where practicable modifications of/or alternatives to the proposed action are still available" [§ 1022.5(b)]. The reviewers could not envision a situation in which alternatives had been foreclosed and in which it was no longer possible to *modify* an activity. DOE agrees that there may be circumstances in which it is still practicable to modify a proposed activity even after implementation has begun. DOE has therefore made a change in §1022.5(b) to specify that where the review of alternatives is no longer practicable or where DOE determines to take action in a floodplain, DOE shall design or modify the selected alternative to reduce adverse effects and mitigate flood hazard. This should also eliminate the confusion some reviewers experienced concerning the meanings of "modifications" and "alternatives."

Three commenters objected to the exemptions provided in § 1022.5(e) for floodproofing and flood protection of existing DOE structures or facilities, and maintenance activities. The commenters felt that such activities may indeed have long- and short-term adverse impacts on floodplains and wetlands. In response to these comments, DOE has eliminated the exemption of floodproofing and flood protection activities, and has modified the exemption of maintenance activities to include only routine maintenance [§ 1022.5(g)]. DOE has retained language which enables consideration of the need for a floodplain/wetlands assessment for routine maintenance involving unusual circumstances.

E. PUBLIC NOTIFICATION PROCEDURES

Several commenters felt that reliance on the publication of a notice in the FEDERAL REGISTER (§ 1022.14) with respect to a proposed floodplain/wetlands action does not satisfy the requirements for early public review and and does not encourage public participation in the floodplain/wetlands decisionmaking process. It is DOE's intent to incorporate floodplain/wetlands notification requirements into the current (and future) applicable NEPA procedures and documentation. DOE believes that these public notification requirements, including the enhanced notification and scoping requirements specified in the CEQ NEPA regulations, will assure an adequate public notification process for those DOE actions, requiring an EIS. Pending the effective date of the CEQ NEPA regulations and DOE implementing procedures, DOE shall, to the extent practicable, issue a Notice of Intent (NOI) to prepare an EIS for proposed floodplain/wetlands actions, where appropriate, and shall circulate the NOI to persons and agencies known to be interested in or affected by the proposed action. New language has been added to § 1022.14 to assure that similar policies and procedures apply to floodplain/wetlands actions, for which no EIS is prepared.

DOE has retained the proposed comment periods following publication of the early public notice and the statement of findings rather than expand these periods as suggested by several commenters. It is believed that the periods allotted in the proposed regulations will permit adequate public participation without unduly delaying agency decisionmaking.

F. OMISSIONS

Four commenters cited omissions in the proposed regulations concerning certain specific requirements of the Executive orders, including policies and procedures with respect to:

1. Consideration of flood hazards for actions involving licenses, permits, loans, grants, or other forms of financial assistance;
2. Delineation of past and probable flood height on DOE property;
3. Lease, easement, right-of-way, or disposal of property to non-Federal entities;
4. Leadership to reduce the risk of flood loss and to minimize the impact of floods on human safety, health and welfare; and
5. Periodic review and update of these regulations.

DOE notes that these items were inadvertently omitted and has, therefore, included provisions in § 1022.3 to address items 1, 2, and 4 above; § 1022.5 to assess items 1 and 3; and § 1022.21 to address item 5.

G. MISCELLANEOUS

Four commenters cited the proposed regulations failure to identify compliance with National Flood Insurance Program (NFIP) standards as a *minimum* requirement, as stated in E.O. 11988. In response, § 1022.3(b) has been modified.

Two commenters were concerned with the procedures for making a wetlands determination in areas where the U.S. Fish and Wildlife Service National Wetlands Inventory maps are not yet available. Several possible alternate sources of information were recommended; these have been added to § 1022.11(c).

The WRC objected to the use of the final EIS as the vehicle to transmit the statement of findings because the final EIS is a pre-decisional document. WRC believes that E.O. 11988 requires the statement of findings to be issued *after* a decision is made. However, section 2(a)(2) of E.O. 11988 requires only that the statement of findings be prepared and circulated for brief public review *prior to taking action*. The final EIS is also issued for review prior to taking action. DOE believes it is useful to incorporate the statement of findings in a final EIS, where possible. Moreover, EPA in its comments, suggested it would be beneficial to issue a draft statement of findings in a draft EIS. Since E.O. 11988 provides for a period of public comment on the statement of findings, DOE feels that this document is most meaningful if it precedes the Agency's final decision.

Several commenters suggested that DOE delete the proposed requirement to review mitigation measures in the floodplain/wetlands assessment because of the Executive orders prohibition against actions in the floodplain/wetlands unless no practicable alternative is available. While DOE is aware of that requirement, it believes that the decisionmaking process as well as public participation in the decisionmaking process will be best served by a review of all relevant considerations in one document. Thus, DOE has continued the requirement that mitigation measures be reviewed along with practicable alternatives in the floodplain/wetlands assessment.

IV. EFFECTIVE DATE

Executive Order 11988 required agencies to issue or amend existing regulations and procedures within one year of its issuance to comply with the Order. DOE has exceeded the time allotted for promulgation of regulations and consequently believes that the goals of the Order will be best served by waiving the normal 30-day transition period prior to effectiveness of the regulations. Accordingly, these regulations will become effective March 7, 1979.

NOTE.—DOE has determined that because this document does not constitute a significant regulation within the meaning of E.O. 12044, preparation of a regulatory analysis is not required.

In consideration of the foregoing, Chapter X of Title 10 of the Code of Federal Regulations is amended as set forth below, effective upon publication.

Issued in Washington, D.C. February 28, 1979.

RUTH C. CLUSEN,
Assistant Secretary for Environment.

Part 1022 is added to Title 10, Chapter X, of the Code of Federal Regulations to read as follows:

PART 1022—COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS

Subpart A—General

Sec.
1022.1 Background.
1022.2 Purpose and scope.
1022.3 Policy.
1022.4 Definitions.
1022.5 Applicability.

Subpart B—Procedures for Floodplain/Wetlands Review

1022.11 Floodplain/wetlands determination.
1022.12 Floodplain/wetlands assessment.
1022.13 Applicant responsibilities.
1022.14 Public review.
1022.15 Notification of decision.
1022.16 Requests for authorizations and appropriations.
1022.17 Follow-up.
1022.18 Timing of floodplain/wetlands actions.
1022.19 Selection of lead agency and consultation among participating agencies.
1022.20 Public inquiries.
1022.21 Updating regulations.

AUTHORITY: E.O. 11988 (May 24, 1977); and E.O. 11990 (May 24, 1977).

Subpart A—General

§ 1022.1 Background.

Executive Order (E.O.) 11988—Floodplain Management (May 24, 1977), requires each Federal agency to issue or amend existing regulations and procedures to ensure that the potential effects of any action it may take in a floodplain are evaluated and that its planning programs and budget requests reflect consideration of flood hazards and floodplain management. Guidance for implementation of the Order is provided in the Floodplain Management Guidelines of the U.S. Water Resources Council (40 FR 6030, February 10, 1978). Executive Order 11990—Protection of Wetlands (May 24, 1977), requires all Federal agencies to issue or amend existing procedures to ensure consideration of wetlands protection in decisionmaking. It is the intent of both Executive orders that Federal agencies implement the floodplain/wetlands requirements through existing procedures such as those established to implement the National Environmental Policy Act (NEPA) of 1969. In those instances where the impacts of actions in floodplains and/or wetlands are not significant enough to require the preparation of an environmental impact statement (EIS) under section 102(2)(C) of NEPA, alternative floodplain/wetlands evaluation procedures are to be established.

§ 1022.2 Purpose and scope.

(a) This part establishes policy and procedures for discharging the Department of Energy's (DOE's) responsibilities with respect to compliance with E.O. 11988 and E.O. 11990, including:

(1) DOE policy regarding the consideration of floodplain/wetlands factors in DOE planning and decisionmaking; and

(2) DOE procedures for identifying proposed actions located in floodplain/wetlands, providing opportunity for early public review of such proposed actions, preparing floodplain/wetlands assessments, and issuing statements of findings for actions in a floodplain.

(b) To the extent possible, DOE will accommodate the requirements of E.O. 11988 and E.O. 11990 through applicable DOE NEPA procedures.

§ 1022.3 Policy.

DOE shall exercise leadership and take action to:

(a) Avoid to the extent possible the long- and short-term adverse impacts associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of floodplain and wetlands development wherever there is a practicable alternative.

(b) Incorporate floodplain management goals and wetlands protection considerations into its planning, regulatory, and decisionmaking processes, and shall to the extent practicable:

(1) Reduce the hazard and risk of flood loss;

(2) Minimize the impact of floods on human safety, health, and welfare;

(3) Restore and preserve natural and beneficial values served by floodplains;

(4) Require the construction of DOE structures and facilities to be, at a minimum, in accordance with the standards and criteria set forth in, and consistent with the intent of, the regulations promulgated by the Federal In-

surance Administration pursuant to the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4001 *et seq.*;

(5) Minimize the destruction, loss, or degradation of wetlands;

(6) Preserve and enhance the natural and beneficial values of wetlands;

(7) Promote public awareness of flood hazards by providing conspicuous delineations of past and probable flood heights on DOE property which has suffered flood damage or is in an identified flood hazard area and which is used by the general public; and

(8) Prior to the completion of any financial transaction related to an area located in a floodplain, which is guaranteed, approved, regulated or insured by DOE, inform any private participating parties of the flood-related hazards involved.

(c) Undertake a careful evaluation of the potential effects of any DOE action taken in a floodplain and any new construction undertaken by DOE in wetlands not located in a floodplain.

(d) Identify, evaluate, and, as appropriate implement alternative actions which may avoid or mitigate adverse floodplain/wetlands impacts; and

(e) Provide opportunity for early public review of any plans or proposals for actions in floodplains and new construction in wetlands.

§ 1022.4 Definitions.

For purposes of this part:

(a) "Action" means any DOE activity, including, but not limited to:

(1) Acquiring, managing, and disposing of Federal lands and facilities;

(2) DOE-undertaken, financed, or assisted construction and improvements; and

(3) The conduct of DOE activities and programs affecting land use, including but not limited to water and related land resources planning, regulating and licensing activities.

(b) "Base Flood" means that flood which has a 1 percent chance of occurrence in any given year (also known as a 100-year flood).

(c) "Critical Action" means any activity for which even a slight chance of flooding would be too great. Such actions may include the storage of highly volatile, toxic, or water reactive materials.

(d) "Environmental Assessment" (EA) means a document for which DOE is responsible that serves to: (1) briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a finding of no significant impact, (2) aid DOE compliance with NEPA when no EIS is necessary, and (3) facilitate preparation of an EIS when one is necessary. The EA shall include brief discussions of the need for the proposal, alternatives, environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

(e) "Environmental Impact Statement" means a document prepared in accordance with the requirements of section 102(2)(C) of NEPA.

(f) "Facility" means any man-placed item other than a structure.

(g) "Finding of No Significant Impact" (FONSI) means a document prepared by DOE which briefly presents the reasons why an action will not significantly effect on the human environment and for which an EIS therefore will not be prepared.

(h) "Flood or Flooding" means a temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the unusual and rapid accumulation or runoff of surface waters from any source.

(i) "Floodplain" means the lowlands adjoining inland and coastal waters and relatively flat areas and flood-prone areas of offshore islands including, at a minimum, that area inundated by a 1 percent or greater chance flood in any given year. The base floodplain is defined as the 100-year (1.0 percent) floodplain. The critical action floodplain is defined as the 500-year (0.2 percent) floodplain.

(j) "Floodplain Action" means any DOE action which takes place in a floodplain.

(k) "Floodplain/Wetlands Assessment" means an evaluation consisting of a description of a proposed action, a discussion of its effects on the floodplain/wetlands, and consideration of alternatives.

(l) "Floodproofing" means the modification of individual structures and facilities, their sites, and their contents to protect against structural failure, to keep water out, or to reduce the effects of water entry.

(m) "High Hazard Areas" means those portions of riverine and coastal floodplains nearest the source of flooding which are frequently flooded and where the likelihood of flood losses and adverse impacts on the natural and beneficial values served by floodplains is greatest.

(n) "Minimize" means to reduce to the smallest degree practicable.

(o) "New Construction" for the purpose of compliance with E.O. 11990 includes draining, dredging, channelizing, filling, diking, impounding, and related activities and any structures or facilities begun or authorized after October 1, 1977.

(p) "Practicable" means capable of being accomplished within existing constraints. The test of what is practicable depends on the situation and includes consideration of many factors, such as environment, cost, technology, and implementation time.

(q) "Public Notice" means a brief notice published in the FEDERAL REGISTER, and circulated to affected and interested persons and agencies, which describes a proposed floodplain/wetlands action and affords the opportunity for public review.

(r) "Preserve" means to prevent modification to the natural floodplain/wetlands environment or to maintain it as closely as possible to its natural state.

(s) "Restore" means to reestablish a setting or environment in which the natural functions of the floodplain can again operate.

(t) "Statement of Findings" means a statement issued pursuant to E.O. 11988 which explains why a DOE action is proposed in a floodplain, lists alternatives considered, indicates whether the action conforms to State and local floodplain standards, and describes steps to be taken to minimize harm to or within the floodplain.

(u) "Structure" means a walled or roofed building, including mobile homes and gas or liquid storage tanks.

(v) "Wetlands" means those areas that are inundated by surface or groundwater with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflow, mudflats, and natural ponds.

(w) "Wetlands Action" means an action undertaken by DOE in a wetlands not located in a floodplain, subject to the exclusions specified at § 1022.5(c).

§ 1022.5 Applicability.

(a) This part shall apply to all organizational units of DOE, except that it shall not apply to the Federal Energy Regulatory Commission.

(b) This part shall apply to all proposed floodplain/wetlands actions, including those sponsored jointly with other agencies, where practicable alternatives to the proposed action are still available. With respect to programs and projects for which the appropriate environmental review has been completed or a final EIS filed prior to the effective date of these regulations, DOE shall, in lieu of the procedures set forth in this part, review the alternatives identified in the environmental review or in the final EIS to determine whether an alternative action may avoid or minimize impacts on the floodplain/wetlands. If project or program implementation has progressed to the point where review of alternatives is no longer practicable, or if DOE determines after a review of alternatives to take action in a floodplain, DOE shall design or modify the selected alternative in order to minimize potential harm to or within the floodplain and to restore and preserve floodplain values. DOE shall publish in the FEDERAL REGISTER, a brief description of measures to be employed and shall endeavor to notify appropriate Federal, State, and local agencies and persons or groups known to be interested in the action.

(c) This part shall not apply to wetlands projects under construction prior to October 1, 1977; wetlands projects for which all of the funds have been appropriated through fiscal year 1977; or wetlands projects and programs for which a draft or final EIS was filed prior to October 1, 1977. With respect to proposed actions located in wetlands (not located in a floodplain), this part shall not apply to the issuance by DOE of permits, licenses, or allocations to private parties for activities involving wetlands which are located on non-Federal property.

(d) This part applies to activities in furtherance of DOE responsibilities for acquiring, managing, and disposing of Federal lands and facilities. When property in a floodplain or wetlands is proposed for lease, easement, right-of-way, or disposal to non-Federal public or private parties, DOE shall: (1) identify those uses that are restricted under Federal, State, or local floodplains or wetlands regulations; (2) attach other appropriate restrictions to the uses of the property; or (3) withhold the property from conveyance.

(e) This part applies to activities in furtherance of DOE responsibilities for providing federally undertaken, financed, or assisted construction and improvements. Applicants for assistance shall provide DOE with an analysis of the impacts which would result from any proposed wetland or floodplain activity.

(f) This part applies to activities in furtherance of DOE responsibilities for conducting Federal activities and programs affecting land use, including but not limited to, water and related resource planning, regulating and licensing activity.

(g) This part ordinarily shall not apply to routine maintenance of existing facilities and structures on DOE property within a floodplain/wetlands since such actions normally have minimal or no adverse impact on a floodplain/wetlands. However, where unusual circumstances indicate the possibility of impact on a floodplain/wetlands, DOE shall consider the need for a floodplain/wetlands assessment for such actions.

(h) The policies and procedures of this part which are applicable to floodplain actions shall apply to all proposed actions which occur in a wetlands located in a floodplain.

Subpart B—Procedures for Floodplain/Wetlands Review

§ 1022.11 Floodplain/wetlands determination.

(a) Concurrent with its review of a proposed action to determine appropriate NEPA requirements, DOE shall determine the applicability of the floodplain management and wetlands protection requirements of this part.

(b) In making the floodplain determination, DOE shall utilize the Flood Insurance Rate Maps (FIRM's) or the Flood Hazard Boundary Maps (FHBM's) prepared by the Federal Insurance Administration of the Department of Housing and Urban Development to determine if a proposed action is located in the base or critical action floodplain, as appropriate. For a proposed action in an area of predominantly Federal or State land holdings where FIRM or FHBM maps are not available, information shall be sought from the land administering agency (e.g., Bureau of Land Management, Soil Conservation Service, etc.) or from agencies with floodplain analysis expertise.

(c) In making the wetlands determination, DOE shall utilize information available from the following sources, as appropriate: (1) U.S. Fish and Wildlife Service National Wetlands Inventory; (2) U.S. Department of Agriculture Soil Conservation Service Local Identification Maps; (3) U.S. Geological Survey Topographic Maps; (4) State wetlands inventories; and (5) regional or local government-sponsored wetland or land use inventories.

§ 1022.12 Floodplain/wetlands assessment.

(a) If DOE determines, pursuant to §§ 1022.5 and 1022.11, that this part is applicable to the proposed action, DOE shall prepare a floodplain/wetlands assessment, which shall contain the following information:

(1) *Project Description.* This section shall describe the nature and purpose of the proposed action, and shall include a map showing its location with respect to the floodplain and/or wetlands. For actions located in a floodplain, the high hazard areas shall be delineated and the nature and extent of the potential hazard shall be discussed.

(2) *Floodplain/Wetlands Effects.* This section shall discuss the positive and negative, direct and indirect, and long- and short-term effects of the proposed action on the floodplain and/or wetlands. The effects of a proposed floodplain action on lives and property, and on natural and beneficial floodplain values shall be evaluated. For actions taken in wetlands, the effects on the survival, quality, and natural and beneficial values of the wetlands shall be evaluated.

(3) *Alternatives.* Alternatives to the proposed action which may avoid adverse effects and incompatible development in the floodplain/wetlands shall be considered, including alternate sites, actions, and no action. Measures that mitigate the adverse effects of actions in a floodplain or wetlands, including but not limited to minimum grading requirements, runoff controls, design and construction constraints, and protection of ecology-sensitive areas shall be addressed.

(b) For proposed floodplain or wetlands actions for which an EA or EIS is required, the floodplain/wetlands assessment shall be prepared concurrent with and included in the appropriate NEPA document.

(c) For floodplain/wetlands actions for which neither an EA or EIS is prepared, a separate document shall be issued as the floodplain/wetlands assessment.

§ 1022.13 Applicant responsibilities.

DOE may require applicants for a DOE permit, license, certificate, financial assistance, contract award, allocation or other entitlement to submit a report on a proposed floodplain/wetlands action. The report shall contain the information specified at § 1022.12 and shall be prepared in accordance with the guidance contained in this part.

§ 1022.14 Public review.

(a) For proposed floodplain/wetlands actions for which an EIS is required, the opportunity for early public review will be provided through applicable NEPA procedures. A Notice of Intent to prepare an EIS may be used to satisfy this requirement.

(b) For proposed floodplain/wetlands actions for which no EIS is required, DOE shall provide the opportunity for early public review through publication of a Public Notice, which shall be published in the FEDERAL REGISTER, as soon as practicable after a determination that a floodplain/wetlands may be affected and at least 15 days prior to the issuance of a statement of findings with respect to a proposed floodplain action. DOE shall take appropriate steps to inform Federal, State, and local agencies and persons or groups known to be interested in or affected by the proposed floodplain/wetlands action. The Public Notice shall include a description of the proposed action and its location and may be incorporated with other notices issued with respect to the proposed action.

(c) Following publication of the Public Notice, DOE shall allow 15 days for public comment prior to making its decision on the proposed action, except as specified in § 1022.18(c). At the close of the public comment period, DOE shall reevaluate the practicability of alternatives to the proposed floodplain/wetlands action and the mitigating measures, taking into account all substantive comments received.

§ 1022.15 Notification of decision.

(a) If DOE finds that no practicable alternative to locating in the floodplain/wetlands is available, consistent with the policy set forth in E.O. 11988, DOE shall, prior to taking action, design or modify its action in order to minimize potential harm to or within the floodplain/wetlands.

(b) For actions which will be located in a floodplain, DOE shall publish a brief (not to exceed three pages) statement of findings which shall contain:

(1) A brief description of the proposed action, including a location map;

(2) An explanation indicating why the action is proposed to be located in the floodplain;

(3) A list of alternatives considered;

(4) A statement indicating whether the action conforms to applicable State or local floodplain protection standards; and

(5) A brief description of steps to be taken to minimize potential harm to or within the floodplain.

For floodplain actions which require preparation of an EA or EIS, the statement of findings may be incorporated into the FONSI or final EIS, as appropriate, or issued separately. Where no EA or EIS is required, DOE shall publish the statement of findings in the FEDERAL REGISTER and distribute copies to Federal, State, and local agencies and others who submitted comments as a result of the Public Notice. For floodplain actions subject to the Office of Management and Budget (OMB) Circular A-95, DOE shall send the statement of findings to the State and areawide A-95 Clearinghouses for the geographic area affected.

§ 1022.16 Requests for authorizations or appropriations.

DOE shall indicate in any requests for new authorizations or appropriations transmitted to OMB, if a proposed action will be located in a floodplain or wetlands, whether the proposed action is in accord with the requirements of E.O. 11990 E.O. 11988, and these regulations.

§ 1022.17 Follow-up.

For those DOE actions taken in floodplain/wetlands, DOE shall verify that the implementation of the selected alternative, particularly with regard to any adopted mitigating measures, is proceeding as described in the floodplain/wetlands assessment and statement of findings.

§ 1022.18 Timing of floodplain/wetlands actions.

(a) Prior to implementing a proposed floodplain action, DOE shall endeavor to allow at least 15 days of public review after publication of the statement of findings.

(b) With respect to wetlands actions (not located in a floodplain), DOE shall take no action prior to 15 days after publication of the Public Notice in the FEDERAL REGISTER.

(c) Where emergency circumstances, statutory deadlines, of overriding considerations of program or project expense or effectiveness exist, the minimum time periods may be waived.

§ 1022.19 Selection of a lead agency and consultation among participating agencies.

When DOE and one or more other Federal agencies are directly involved in a floodplain/wetlands action, DOE shall consult with such other agencies to determine if a floodplain/wetlands assessment is required, to identify the appropriate lead or joint agency responsibilities, to identify the applicable regulations, and to establish procedures for interagency coordination during the environmental review process.

§ 1022.20 Public inquiries.

Inquiries regarding DOE's floodplain/wetlands activities may be directed to the Assistant Secretary for Environment, Department of Energy, Washington, D.C. 20545.

§ 1022.21 Updating regulations.

DOE shall periodically review these regulations, evaluate their effectiveness, and make appropriate revisions.

[FR Doc. 79-6855 Filed 3-6-79; 8:45 am]

TAB E
COASTAL ZONE MANAGEMENT

federal register

Monday
June 25, 1979

Part V

Department of Commerce

National Oceanic and Atmospheric Administration

Consistency for Department of the Interior Outer Continental Shelf (OCS) Prelease Sale Activities and for Other Federal Activities Directly Affecting the Coastal Zone

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 930

Consistency for Department of the Interior Outer Continental Shelf (OCS) Prelease Sale Activities and for Other Federal Activities Directly Affecting the Coastal Zone

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: This rule amends existing regulations to provide conformance with the U.S. Justice Department opinion, dated April 20, 1979, which concludes that the Department of the Interior's Outer Continental Shelf (OCS) prelease sale activities which directly affect the coastal zone must be undertaken in a manner consistent, to the maximum extent practicable, with the requirements of approved coastal management programs in accordance with section 307(c)(1) of the Coastal Zone Management Act (CZMA), as amended. The opinion further provides that the phrase "directly affecting" in section 307(c)(1) of the CZMA, which specifically applies to OCS prelease sale activities, should be included in the regulations instead of using alternative language such as "significantly" affecting the coastal zone in terms of "primary," "secondary" and "cumulative" impacts presently in the regulations. The amendments to the regulations also include minor editorial modifications and corrections.

EFFECTIVE DATE: June 25, 1979.

FOR FURTHER INFORMATION CONTACT: Michael E. Shapiro, Policy and Program Evaluation, Office of Coastal Zone Management, (202) 634-4245, NOAA, Page Building 1, 2001 Wisconsin Avenue, NW., Washington, D.C. 20235.

SUPPLEMENTARY INFORMATION:

(A) Consistency for OCS Prelease Sale Activities

On April 20, 1979, the U.S. Department of Justice issued an opinion which concluded that neither the CZMA Amendments of 1976 nor the OCS Lands Act Amendments of 1978 repealed the application of section 307(c)(1) consistency to the Department of the Interior's OCS prelease sale activities. The opinion jointly was requested by the Commerce and Interior Departments because they were unable to agree on whether section 307(c)(1) applied to OCS preleasing activities (see 42 FR 43591-92, August 29, 1977, and 43 FR 10512, March 13, 1978). The Justice Department opinion supports the position taken by the Department of Commerce on this point.

Department of the Interior (DOI) OCS prelease sale activities include the determination of tracts to be offered for sale and choice of lease stipulations. In cases where these types of actions directly affect the coastal zones of States with approved coastal programs, DOI must ensure that the actions are conducted in a manner consistent, to the maximum extent practicable, with coastal program provisions. This requirement is now embodied in a *Comment* under § 930.71 of the regulations.

In reaching its decision, the Justice Department took notice of the legislative history of the OCS Lands Act Amendments where Congress indicated that:

> "Under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 et seq.), certain OCS activities including lease sales and approval of development and production plans must comply with "consistency" requirements as to coastal management plans approved by the Secretary of Commerce. Except for specific changes made by Titles IV and V of the (OCS Lands Act) Amendments, nothing in this Act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under the Act for consistency once a State has an approved Coastal Zone Management Plan." (H. Report 95-590, p. 153, fn. 52.)

The Justice Department also pointed out that the application of section 307(c)(1) consistency to DOI's OCS prelease sale activities complements the section 307(c)(3)(B) consistency requirement applicable to lessee OCS plans because:

> "It is well possible that some of the preleasing activities of the Secretary of the Interior will give rise to consistency problems which cannot be reviewed at all under the paragraph (B) procedure, or for which such review comes too late."

Accordingly, section 307(c)(1) of the CZMA applies to DOI's OCS prelease sale activities directly affecting the coastal zone. As indicated in Subpart C of the regulations, the "directly affecting" threshold test is normally to be applied on a case-by-case basis, depending on the factual character of the Federal activity under review. Implementation of this requirement at the OCS prelease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts, thereby reducing conflicts with affected States and avoiding delay in the exploitation of offshore energy resources. The Office of Coastal Zone Management will be available to work closely with DOI and affected coastal States to ensure expeditious implementation and coordination for this requirement.

(B) The Phrase "Directly Affecting" the Coastal Zone

In the same opinion, the Justice Department took issue with the Department of Commerce regulations that define the section 307(c)(1) phrase "directly affecting" the coastal zone to mean "significantly" affecting the coastal zone in terms of "primary," "secondary" and "cumulative" impacts (see 15 CFR 930.21, 43 FR 10518-19, March 13, 1978). The Justice Department determined that the plain language of the statute should control and declared that the issue—under what circumstances a given Federal activity "directly affected" a State's coastal zone—is essentially one of fact. The Justice Department concluded that Congress explicitly expressed an intent in the CZMA to apply different standards to the various consistency provisions and, therefore, no justification for eliminating these statutory distinctions exists.

In response to this opinion, NOAA is deleting the definition "significantly affecting the coastal zone" in section 930.21, and will use, without definition, the term "directly affecting" in Subpart C of the regulations (Consistency for Federal Activities). Similarly, the "significant" effect test will no longer apply to Federal actions covered by Subpart D (Consistency for Activities requiring a Federal License or Permit), Subpart E (Consistency for Outer Continental Shelf Exploration, Development and Production Activities) and Subpart F (Consistency for Federal Assistance to State and Local Governments). In Subparts D, E and F, the term "affecting the coastal zone" will be used, again without definition. This is the common statutory threshold test used in sections 307(c)(3)(a), 307(c)(3)(B) and 307(d) of the CZMA.

While the amended regulations will not include definitions for the terms "directly affecting the coastal zone" and "affecting the coastal zone," guidance in this Supplementary Information in the form of regulatory and legislative history is intended to assist Federal and State agencies, as well as other affected parties, in their efforts to determine when the consistency requirements of the CZMA apply to Federal actions.

In the proposed Federal consistency regulations issued in September 1976, NOAA first adopted the decision, to which it has now returned, of using the threshold terms of the CZMA (i.e., "directly affecting" the coastal zone, and "affecting" the coastal zone) without attempting to define rigidly their meaning. NOAA stated that, "these terms will speak for themselves and difficulties will be addressed on a case-by-case basis" (41 FR 42880, September 28, 1976).

Thereafter, in reproposed regulations issued in August 1977, NOAA attempted to define these terms in response to comments requesting clarification. NOAA prefaced its definition with a statement indicating that a precise definition would be impossible to develop in light of the absence of clear Congressional guidance. Then, based on analogous language in another section of the CZMA as well as language which first appeared as part of the Federal consistency provisions of proposed national land use legislation, NOAA adopted the "significantly affecting" threshold test for section 307(c)(1) of the CZMA (see 42 FR 43590, 43598, August 29, 1977).

Later, in the final consistency regulations issued in March, 1978, a new term and definition—"significantly affecting the coastal zone"—was adopted to apply to all Federal actions subject to the consistency requirements of the CZMA. This change was in response to comments suggesting that Congressional intent, although not explicit, appeared to revolve around the need to capture within the consistency requirements only those Federal actions capable of "significantly" affecting the coastal zone (see 43 FR 10511, 10518, March 13, 1978). The Justice Department opinion has led us back to our original view that precise definitions for these terms are impossible to create.

While the legislative history is quite general on the matter, it does set some bounds within which the threshold test may be applied. The Conference Report to the CZMA of 1972 merely restates the statutory language while noting that Federal actions both inside and outside of the coastal zone are captured by the consistency provisions when threshold effects are reached. Other Congressional committee reports reference an interest in "significant" effects on coastal resources. Still other legislative history is written in terms of applying the consistency requirements whenever Federal activities within or adjacent to the coastal zone are determined to have a "functional interrelationship from an economic, social, or geographic standpoint" with lands and waters within the coastal zone.

The consistency provisions are unique and Congress thus far has left the affected parties with a certain amount of discretion to work out the details of their novel intergovernmental coordination efforts. As a practical matter, States, Federal agencies and other affected parties have not had serious problems in agreeing on whether a Federal action will reach a threshold of impact upon coastal zone resources sufficient to warrant the initiation of the cooperative dialogue called for by the Federal consistency requirements. Intergovernmental coordination has been the general rule because of the benefits which accrue. By virtue of the consistency provisions, a decision that a proposed Federal action may impact the coastal zone leads to consultation with the State to ensure that the action will be undertaken in a manner which conforms with the preservation and development criteria within the State's coastal program. Further, the consistency information provides the State with an opportunity to review and comment on the proposal, and assists the State in planning for and managing the anticipated coastal zone effects. Given the advantages to be derived from this process, all affected parties are encouraged to continue to construe liberally the threshold tests to favor inclusion of Federal actions subject to consistency review.

Amended Regulations Effective Immediately

Since the amendments to the regulations described above are required as a matter of law, NOAA hereby finds for good cause, in accordance with 5 U.S.C. 553 (b) and (d), that notice and public procedures on such regulatory amendments and the 30-day delay prior to the effective date of amendments are unnecessary. Pursuant to section 2.03 of NOAA Directive 21–24, the implementation of Executive Order 12044, NOAA has determined that these regulation amendments are not significant.

For the convenience of the public, the Federal consistency regulations, as amended, are displayed in their entirety to reflect the modifications issued in response to: (i) The requirements of the Outer Continental Shelf Lands Act Amendments of 1978 (see 44 FR 3705, January 18, 1979), (ii) the opinion of the U.S. Department of Justice dated April 20, 1979 (see discussion above), and (iii) the need to provide minor editorial modifications and corrections.

Dated: June 11, 1979.

R. L. Carnahan,

Assistant Administrator for Administration.

Accordingly, 15 CFR Part 930 is revised to read as follows:

PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS

Subpart A—Objectives

Sec.
930.1 Overall Objectives.

Subpart B—General Definitions

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930.16 Assistant Administrator.
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930.21 Associated facilities.

Subpart C—Consistency for Federal Activities

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930.36 Availability of mediation for negative determination disputes.
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930.38 Consistency determinations for activities initiated prior to management program approval.
930.39 Content of a consistency determination.
930.40 Multiple Federal agency participation.
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Subpart D—Consistency for Activities Requiring a Federal License or Permit

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930.53 Management program license and permit listing.
930.54 Unlisted Federal license and permit activities.
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930.57 Consistency certifications.
930.58 Necessary data and information.

930.59 Multiple permit review.
930.60 Commencement of State agency review.
930.61 Public notice.
930.62 Public hearings.
930.63 State agency concurrence with a consistency certification.
930.64 State agency objection to a consistency certification.
930.65 Federal permitting agency responsibility.
930.66 Availability of mediation for previously reviewed activities.

Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities

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930.72 Person.
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930.76 Submission of an OCS plan and consistency certification.
930.77 Necessary data and information.
930.78 Commencement of State agency review; public notice.
930.79 State agency concurrence or objection.
930.80 Effect of State agency concurrence.
930.81 Federal permitting agency responsibility.
930.82 Multiple permit review.
930.83 Amended or new OCS plans.
930.84 Review of amended or new OCS plans; public notice.
930.85 Continuing State agency objections.
930.86 Failure to comply substantially with an OCS plan.

Subpart F—Consistency for Federal Assistance to State and Local Governments

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930.91 Federal assistance.
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930.93 OMB A-95 process.
930.94 Guidance provided by the State agency.
930.95 OMB A-95 project notification and review.
930.96 Consistency review.
930.97 Federal assisting agency responsibility.
930.98 Federally assisted activities outside of the coastal zone or the described geographic area.
930.99 Availability of mediation for Federal assistance disputes.
930.100 Availability of mediation for previously reviewed activities.

Subpart G—Secretarial Mediation

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930.111 Informal negotiations.
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930.113 Public hearings.
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Subpart H—Secretarial Review Related to the Objectives or Purposes of the Act and National Security Interests

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930.121 Consistent with the objectives or purposes of the Act.
930.122 Necessary in the interest of national security.
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930.125 Appeals to the Secretary.
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930.131 Federal agency responsibility.
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930.134 Secretarial review; Federal agency responsibility.

Subpart I—Assistant Administrator Reporting and Continuing Review of Federal Actions Subject to the Federal Consistency Requirements

930.140 Objectives.
930.141 Notification of Federal actions believed to be inconsistent with approved management programs.
930.142 Notification of Federal actions believed to have been incorrectly determined to be inconsistent with an approved management program.
930.143 Assistant Administrator reporting.
930.144 Assistant Administrator advisory statements.
930.145 Review of the implementation of the Federal consistency provisions.

Authority.—Secs. 307, 316 and 317, Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280 (16 U.S.C. 1451 et seq.), as amended by Pub. L. 94-370, 90 Stat. 1013.

Subpart A—Objectives

§ 930.1 Overall objectives.

The objectives of these regulations are: (a) To describe the obligations of all agencies, individuals and other parties who are required to comply with the Federal consistency provisions of the Coastal Zone Management Act;

(b) To implement the Federal consistency provisions in a manner which strikes a balance between the need to ensure consistency for Federal actions affecting the coastal zone with approved coastal management and the need to promote Federal programs;

(c) To provide flexible procedures which foster intergovernmental cooperation and minimize duplicative effort and unnecessary delay, while making certain that the objectives of the Federal consistency provisions of the Act are satisfied;

(d) To interpret significant terms in the Federal consistency provisions so that they can be uniformly understood and adhered to by all agencies, individuals and other affected parties;

(e) To provide procedures to make certain that all Federal agency and State agency consistency decisions are directly related to the objectives, policies, standards and other criteria set forth in, or referenced as part of, approved coastal management programs;

(f) To provide procedures which the Secretary, in cooperation with the Executive Office of the President, may use to mediate serious disagreements which arise between Federal and State agencies during the administration of approved coastal management programs;

(g) To provide procedures which permit the Secretary to review Federal license or permit activities, or Federal assistance activities, to determine whether they are consistent with the objectives or purposes of the Act, or are necessary in the interest of national security;

(h) To provide procedures which permit interested parties to notify the Assistant Administrator for Coastal Zone Management of Federal actions believed to be inconsistent with approved coastal management programs, or believed to have been incorrectly determined to be inconsistent with an approved management program; and

(i) To provide procedures for the reporting of any Federal actions found by the Assistant Administrator for Coastal Zone Management to be inconsistent with an approved coastal zone management program, and for the performance review of State implementation of the Federal consistency provisions.

Subpart B—General Definitions

§ 930.10 Index to definitions.

The following list includes all terms defined in Part 930 of this title keyed to the section or paragraph in which they are defined.

Term	Section
Act	930.11
Appellant	930.123
Applicant	930.52
Applicant agency	930.92
Assistant Administrator	930.18
Associated facilities	930.21
Coastal Zone	930.29
Consistent to the maximum extent practicable	930.32
Consistent with the objectives or purposes of the Act	930.121
Development project	930.31(b)
Executive Office of the President	930.14
Failure substantially to comply with an OCS plan	930.86(d)
Federal activity	930.31
Federal agency	930.17
Federal assistance	930.91

Term	Section
Federal license or permit	930.51
Federal license or permit activity described in detail	930.71
Management program	930.19
Necessary in the interest of national security	930.122
OCS plan	930.73
OCZM	930.15
OMB A-95 process	930.93
Person	930.72
Secretary	930.13
Section	930.12
State agency	930.18

§ 930.11 Act.

The term "Act" means the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.).

§ 930.12 Section.

The term "Section" means a section of the Coastal Zone Management Act of 1972, as amended.

§ 930.13 Secretary.

The term "Secretary" means the Secretary of the U.S. Department of Commerce.

§ 930.14 Executive Office of the President.

The term "Executive Office of the President" means the office, council, board, or other entity within the Executive Office of the President which shall participate with the Secretary in seeking to mediate serious disagreements which may arise between a Federal agency and a coastal State.

§ 930.15 OCZM.

The term "OCZM" means the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

§ 930.16 Assistant Administrator.

The term "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

§ 930.17 Federal agency.

The term "Federal agency" means any department, agency, board, commission, council, independent office or similar entity within the executive branch of the Federal Government, or any wholly owned Federal Government corporation.

§ 930.18 State agency.

(a) The term "State agency" means the agency of the State government designated pursuant to section 306(c)(5) of the Act to receive and administer grants for an approved coastal management program, or a single designee State agency appointed by the 306(c)(5) State agency. Any appointment by the 306(c)(5) State agency of a designee agency must be described in the State's management program. In the absence of such description, all consistency determinations, consistency certifications and Federal assistance proposals shall be sent to and reviewed by the 306(c)(5) State agency.

(b) The State agency is responsible for commenting on Federal agency consistency determinations (see subpart C of this part), concurring with or objecting to consistency certifications for Federal licenses, permits, and Outer Continental Shelf plans (see subparts D and E of this part), and reviewing the consistency of Federal assistance activities proposed by State or local government agencies (see subpart F of this part). The State agency shall be responsible for securing necessary review and comment from other State, regional, or local government agencies. Thereafter, only the State agency is authorized to comment officially on a Federal consistency determination, concur with or object to a consistency certification, or determine the consistency of a proposed Federal assistance activity.

§ 930.19 Management program.

The term "management program" has the same definition as provided in section 304(11) of the Act, except that for the purposes of this part the term is limited to those management programs adopted by a coastal State in accordance with the provisions of section 306 of the Act, and approved by the Assistant Administrator.

§ 930.20 Coastal zone.

The term "coastal zone" has the same definition as provided in section 304(1) of the Act.

(*Comment.* See 15 CFR 923.33 for a discussion of the relationship between the Federal consistency provisions of the Act and Federal lands excluded from the boundaries of the coastal zone.)

§ 930.21 Associated facilities.

The term "associated facilities" describes all proposed facilities:

(a) Which are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a Federal action (e.g., activity, development project, license, permit, or assistance), and

(b) Without which the Federal action, as proposed, could not be conducted.

All further requirements in this part related to the review of and consistency for Federal activities including development projects (see subpart C of this part), Federal license and permit activities (see subparts D and E of this part) and Federal assistance activities (see subpart F of this part) also apply to associated facilities related to those Federal actions. Therefore, the proponent of a Federal action must consider whether the Federal action and its associated facilities affect the coastal zone and, if so, whether these interrelated activities satisfy the relevant consistency requirement of the Act.

(*Comment.* Associated facilities are, in reality, an indispensable part of the proposed Federal action. Accordingly, this section requires their concurrent review along with the remainder of the proposal to ensure that the State agency is informed of all the critical elements of the proposal. As a result, the State agency will have complete information to fulfill its coastal planning and managemen responsibilities, and the proponent of the Federal action will not be faced with the situation where there has been receipt of State agency approval regarding one element of the project with later objection to an associated facility which was not earlier reviewed with the remainder of the proposal For example, this section requires a Federal agency to make certain that both a proposed Federal waste treatment facility and a proposed pipeline connection which must b constructed to meet the needs of the facility are consistent, to the maximum extent practicable, with an approved management program where these interrelated activities directly affect the coastal zone (see subpar of this part).)

Subpart C—Consistency for Federal Activities

§ 930.30 Objectives.

The provisions of this subpart are provided to assure that all Federally conducted or supported activities including development projects direct affecting the coastal zone are undertaken in a manner consistent to the maximum extent practicable with approved State coastal management programs.

(*Comment.* Statutory citation. Subsecti 307(c)(1): "Each Federal agency conducti supporting activities directly affecting the coastal zone shall conduct or support tho activities in a manner which is, to the maximum extent practicable, consistent approved state management programs."

Subsection 307(c)(2):

"Any Federal agency which shall undert any development project in the coastal z of a state shall insure that the project is the maximum extent practicable, consist with approved state management progra

§ 930.31 Federal activity.

(a) The term "Federal activity" m any functions performed by or on b of a Federal agency in the exercise of its statutory responsibilities.

(*Comment.* A Federal activity is performed on behalf of a Federal agency in situations where a contractor will undertake the construction, operation, or other functions of the Federal agency. For example, the private construction of a Federal military installation meets this test.)

(b) A Federal development project is a Federal activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, utilization, or disposal of land or water resources.

(c) The term "Federal activity" does not include the issuance of a Federal license or permit to an applicant or person (see subparts D and E of this part) or the granting of Federal assistance to an applicant agency (see subpart F of this part).

(*Comments.* Federal activities other than development projects may be viewed as a residual category covering Federal actions which are neither Federal development projects nor activities covered by the Federal license, permit and assistance subparts. Examples would include:

(1) Federal waste disposal plans developed for Federal facilities pursuant to statutory or regulatory directives (the plan is an activity but not a development project);

(2) Federal agency activities requiring a Federal license or permit (such activities by Federal agencies are not covered by the Federal license and permit subpart); and

(3) Federal assistance for housing development to entities other than State and local governments, such as to private interests or Indian tribes (the Federal assistance provisions in subpart F only apply to State and local government applicants for Federal assistance).)

§ 930.32 Consistent to the maximum extent practicable.

(a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program.

(*Comment.* The word "practicable" within this definition means capable of being done. When modified by the phrase "to the maximum extent," the complete term means to the fullest degree permitted by existing law. Federal agency conformance with existing law is preserved as a result of section 307(e) of the Act which declares that:

"Nothing in this title shall be construed: (1) To diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) As superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.")

The duty the Act imposes upon Federal agencies is not set aside by virtue of section 307(e). The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c) (1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of some unforeseen circumstances arising after the approval of the management program which present the Federal agency with a substantial obstacle that prevents complete adherence to the approved program.

(*Comment.* The legislative history of the Act states that Congress did not anticipate "that there will be any considerable number of situations where as a practical matter a Federal agency cannot conduct or support activities without deviating from approved State management programs." This anticipated result stems from Congress' intent that Federal agencies consult with the Secretary and State agencies during program development so that "any aspects or phases of the proposed program which are deemed by any agency to be impractical to carry out or support will be brought to the attention of the Secretary and steps will be taken at that point to iron out whatever differences appear to be established." To ensure this intergovernmental consultation, Congress provided that: (i) management programs be developed and adopted with an opportunity for full participation by affected Federal agencies (section 306(c)(1)), (ii) the Secretary shall not approve a management program unless the views of affected Federal agencies have been adequately considered (section 307(b)), and (iii) the Secretary, in cooperation with the Executive Office of the President, seek to mediate serious disagreements between any Federal agency and a coastal state regarding the development of a management program (section 307(h)(1)). Congress, however, indicated in the legislative history a need to permit deviations from management program provisions in limited cases where circumstances arise which were not foreseen at the time of program approval, and such circumstances create a substantial obstacle preventing complete adherence to the approved program. Accordingly, the rule in paragraph (a) requiring full consistency with the management program, when legally permissible, will apply in a substantial majority of cases with exceptions permitted only for the special circumstances described in paragraph (b).)

§ 930.33 Identifying Federal activities directly affecting the coastal zone.

(a) Federal agencies shall determine which of their activities directly affect the coastal zone of States with approved management programs.

(b) Federal agencies shall consider all development projects within the coastal zone to be activities directly affecting the coastal zone. All other types of activities within the coastal zone are subject to Federal agency review to determine whether they directly affect the coastal zone.

(*Comment.* Some Federal activities, such as a particular resource procurement practice, may not have the potential for causing a direct effect upon the coastal zone even when undertaken within the coastal zone.)

(c) Federal activities outside of the coastal zone (e.g., on excluded Federal lands, on the Outer Continental Shelf, or landward of the coastal zone) are subject to Federal agency review to determine whether they directly affect the coastal zone.

(*Comment.* A determination that a proposed Federal activity directly affects the coastal zone leads to two important benefits. First, this finding requires the Federal agency to review the activity to assure that it will be undertaken in a manner consistent to the maximum extent practicable with an approved management program and, second, the consistency determination will provide the State agency with an opportunity to review and comment on the proposed activity, and will assist the State in planning for and managing the anticipated coastal zone effects. Given the benefits to be derived from this process, Federal agencies are encouraged to construe liberally the "directly affecting" test in borderline cases so as to favor inclusion of Federal activities subject to consistency review.)

§ 930.34 Federal agency consistency determinations.

(a) Federal agencies shall provide State agencies with consistency determinations for all Federal activities directly affecting the coastal zone. The Federal agency may provide the State agency with this information in any manner it chooses so long as the requirements of this Subpart are satisfied.

(*Comment.* Federal agencies are strongly encouraged to provide consistency determinations to State agencies through use of existing notification procedures (e.g., OMB Circular A-95, NEPA environmental impact statements, memoranda of understanding, etc.) in order to avoid waste, duplication of effort, and to reduce Federal and State agency administrative burdens. The use of existing procedures is permissible so long as such procedures are modified or supplemented as necessary to satisfy the requirements of this Subpart.)

(b) Federal agencies shall provide State agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the activity. A consistency determination should be prepared following development of sufficient information to determine reasonably the consistency of the activity with the State's management program, but before the Federal agency reaches a significant point of decisionmaking in its review process. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to an alternative notification schedule.

(*Comment.* Federal and State agencies are encouraged to agree upon flexible procedures for extending the notification requirement beyond 90 days for major activities requiring a substantial period for adequate review, and for lessening the notification period for minor activities.)

§ 930.35 Federal and State agency coordination.

(a) State agencies should list in their management programs Federal activities which, in the opinion of the State agency, are likely to directly affect the coastal zone and require a Federal agency consistency determination. Listed Federal activities must be described in terms of the specific type of activity involved (e.g., Federal reclamation projects). In the event the State agency chooses to describe Federal activities outside of the coastal zone but likely to directly affect the coastal zone, it must also describe the geographic location of such activities (e.g., reclamation projects in coastal floodplains).

(*Comment.* During management program development, Federal agencies should inform State agencies of their Federal activities. From this description, the Federal and State agencies should develop agreements regarding those Federal activities likely to directly affect the coastal zone, and these activities should be the ones listed in the management program.

(b) State agencies should monitor unlisted Federal activities (e.g., by use of OMB Circular A-95 review, review of National Environmental Policy Act (NEPA) environmental impact statements, etc.) and should notify Federal agencies of unlisted Federal activities which Federal agencies have not subjected to a consistency review but which, in the opinion of the State agency, directly affect the coastal zone and require a Federal agency consistency determination. State agencies must notify Federal agencies within 45 days from receipt of notice of the unlisted Federal activity, otherwise the State agency waives its right to request a consistency determination. The waiver does not apply in cases where the State agency does not receive notice of the Federal activity (e.g., for those Federal activities which are not processed through A-95 review, NEPA review or a similar procedure which permits State agency monitoring).

(*Comment.* During management program development, Federal and State agencies should develop agreements to modify or supplement existing intergovernmental coordination procedures (e.g., A-95 review) to make certain that State agencies are provided a reasonable opportunity to monitor all Federal activities likely to directly affect the coastal zone.)

(c) The recommended listing and monitoring procedures described in paragraphs (a) and (b) of this section are neither a substitute for nor eliminate Federal agency responsibility under §§ 930.33(b) and 930.34 to provide State agencies with consistency determinations for all development projects in the coastal zone and for all other Federal activities which the Federal agency finds directly affect the coastal zone.

(*Comment.* The provisions in paragraphs (a) and (b) simply represent recommended procedures for facilitating State agency review of Federal activities which reasonably can be expected to directly affect the coastal zone. Whether adopted in full, in part, or not at all by Federal and State agencies, the responsibility of Federal agencies to provide State agencies with information regarding all Federal activities directly affecting the coastal zone continues to apply. Accordingly, the failure of a State agency to either list or monitor Federal activities does not remove the requirement for Federal agencies to provide State agencies with consistency determinations when the Federal agency independently concludes that the proposed activity will directly affect the coastal zone.)

(d) If a Federal agency decides that a consistency determination is not required for a Federal activity (1) identified by a State agency on its list or through case-by-case monitoring, (2) which is the same as or similar to activities for which consistency determinations have been prepared in the past, or (3) for which the Federal agency undertook a thorough consistency assessment and developed initial findings on the effects of the activity on the coastal zone, the Federal agency shall provide the State agency with a notification, at the earliest practicable time in the planning of the activity, briefly setting forth the reasons for its negative determination. A negative determination shall be provided to the State agency at least 90 days before final approval of the activity, unless both the Federal agency and the State agency agree to an alternative notification schedule.

(*Comment.* The negative determination procedures are provided to assure State agencies an opportunity to review borderline cases.)

§ 930.36 Availability of mediation for negative determination disputes.

In the event of a serious disagreement between a Federal agency and a State agency regarding a determination related to whether a proposed activity directly affects the coastal zone, either party may seek the Secretarial mediation services provided for in Subpart G.

§ 930.37 Consistency determinations for proposed activities.

(a) Federal agencies shall review their proposed Federal activities which directly affect the coastal zone in order to develop consistency determinations which indicate whether such activities will be undertaken in a manner consistent to the maximum extent practicable with approved State management programs. Federal agencies are encouraged to consult with State agencies during their efforts to assess whether such activities will be consistent to the maximum extent practicable with such programs.

(b) In cases where Federal agencies will be performing repeated activity other than a development project (e.g., ongoing maintenance, waste disposal, etc.) which cumulatively has a direct effect upon the coastal zone, the agency may develop a general consistency determination thereby avoiding the necessity of issuing separate consistency determinations for each incremental action controlled by the major activity. A general consistency determination may only be used in situations where the incremental actions are repetitive or periodic, substantially similar in nature, and do not directly affect the coastal zone when performed separately. If a Federal agency issues a general consistency determination, it must thereafter periodically consult with the State agency to discuss the manner in which the incremental actions are being undertaken.

(c) In cases where the Federal agency has sufficient information to determine the consistency of a proposed development project from planning to completion, only one consistency determination will be required. However, in cases where major Federal decisions related to a proposed development project will be made in phases based upon developing information, with each subsequent phase subject to Federal agency discretion to implement alternative decisions based upon such information (e.g., planning, siting, and design decisions), a consistency determination will be required for each major decision. In cases of phased decisionmaking, Federal agencies shall ensure that the development project continues to be consistent to the maximum extent practicable with the State's management program.

§ 930.38 Consistency determinations for activities initiated prior to management program approval.

(a) A consistency determination will be required for ongoing Federal activities other than development projects (e.g., waste disposal practices) initiated prior to management program approval, which are governed by statutory authority under which the Federal agency retains discretion to reassess and modify the activity. In these cases the consistency determination must be made by the Federal agency at the earliest practicable time following management program approval, and the State agency must be provided with a consistency determination no later than 120 days after management program approval for ongoing activities which the State agency lists or identifies through monitoring as subject to consistency with the management program.

(*Comment.* The Act requires Federal agencies which are "conducting or supporting" activities directly affecting the coastal zone to comply with the Federal consistency requirements. Therefore, if a Federal agency is undertaking an activity at the time of management program approval and the program provisions require modification of the activity, the Federal agency must issue a consistency determination to the State agency indicating how the activity will be conducted in a manner consistent to the maximum extent practicable with the approved program. In these cases, Federal agencies should consider general revisions of regional directives to reflect the consistency obligations which result following program approval.)

(b) A consistency determination shall be required for major, phased Federal development project decisions described in § 930.37(c) which are made following management program approval and are related to development projects initiated prior to program approval. In making these new decisions, Federal agencies shall consider coastal zone effects not fully evaluated at the outset of the project. This provision shall not apply to phased Federal decisions which were specifically described, considered and approved prior to management program approval (e.g., in a final environmental impact statement issued pursuant to the National Environmental Policy Act).

§ 930.39 Content of a consistency determination.

(a) The consistency determination shall include a brief statement indicating whether or not the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the management program. The statement must be based upon an evaluation of the relevant provisions of the management program. The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the statement evaluation, activity description and supporting information shall be commensurate with the expected effects of the activity on the coastal zone.

(*Comment.* As a preliminary matter, Federal agencies are strongly encouraged to obtain the views and assistance of the State agency regarding the provisions of the management program which are related to the proposed activity and the information necessary to determine whether the proposed activity will be conducted in a manner consistent to the maximum extent practicable with the management program.)

(b) Federal agencies shall be guided by the following in making their consistency determinations. The activity (e.g., project siting and constuction), its direct effects (e.g., air, water, waste discharges, etc.), and associated facilities (e.g., proposed siting and construction of access road, connecting pipeline, support buildings, etc.) and the direct effects of the associated facilities (e.g., erosion, wetlands, beach access impacts, etc.) must all be consistent to the maximum extent practicable with the management program. Although nonassociated facilities (e.g., recreational housing which is induced by but not necessarily related to a Federal harbor dredging project—see § 930.21) must be included within the consistency determination's description of the direct effects of the activity, Federal agencies are not responsible for evaluating the consistency of such facilities.

(*Comment.* Following notification from the Federal agency, the responsibility for planning for and managing the impacts caused by proposed nonassociated facilities rests with the State agency. Through the requirements of the management program the State agency has the authority to prohibit or control the development of facilities which are not directly associated with the proposed Federal activity (e.g., by enforcing land use/zoning requirements, by denying or conditioning the issuance of State or local governmental coastal permits, by objecting to the consistency of Federal permits or assistance that might be required for the facilities, etc.).)

(c) In making their consistency determinations, Federal agencies shall give appropriate weight to the various types of provisions within the management program. Federal agencies must ensure that their activities are consistent to the maximum extent practicable with the enforceable, mandatory policies of the management program. However, Federal agencies need only give adequate consideration to management program provisions which are in the nature of recommendations. Finally, Federal agencies do not have to evaluate coastal zone effects for which the management program does not contain mandatory or recommended policies because, in the absence of such provisions, there is no basis for making a consistency determination with respect to such effects.

(*Comment.* The consistency obligations imposed by the Act are only as extensive as the provisions of the management program. Therefore, to the extent a Federal activity relates to coastal issues which are addressed by the management program only in the form of recommended policies, Federal agencies need only give adequate consideration to such recommendations. Similarly, in the absence of any relevant management program policies related to certain effects caused by a Federal activity, the Federal agency is without any provisions or criteria to measure the consistency of the activity. In the event management program administration reveals the existence of additional coastal issues which should be addressed by the management program, the State agency should pursue program amendments to deal with emerging problems.)

(d) When Federal agency standards are more restrictive than standards or requirements contained in the State's management program, the Federal agency may continue to apply its stricter standards (e.g., restrict project development or design alternatives notwithstanding permissive management program policies). In such cases the Federal agency should inform the State agency in the consistency determination of the statutory, regulatory or other basis for the application of the stricter standards.

§ 930.40 Multiple Federal agency participation.

Whenever more than one Federal agency is involved in conducting or supporting a Federal activity or its associated facilities directly affecting the coastal zone, or is involved in a group of Federal activities related to each other because of their geographic proximity, consideration should be given to the preparation of one consistency determination for all the Federal activities involved. In such cases, Federal agencies should consider joint preparation or lead agency development of the consistency determination. In either case, the consistency determination (a) must be transmitted to the State agency at least 90 days before final decisions are taken by any of the participating agencies, (b) must indicate whether or not each of the proposed activities is consistent to the maximum extent practicable with the management program, and (c) must include information on each proposed activity sufficient to support the consistency determination.

§ 930.41 State agency response.

(a) A State agency shall inform the Federal agency of its agreement or disagreement with the Federal agency's consistency determination at the earliest practicable time. If a final response has not been developed and issued within 45 days from receipt of the Federal agency notification, the State agency should at that time inform the Federal agency of the status of the matter and the basis for further delay. The Federal agency may presume State agency agreement if the State agency fails to provide a response within 45 days from receipt of the Federal agency notification.

(b) State agency agreement shall not be presumed in cases where the State agency, with the 45 day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information contained in the consistency determination.

(c) Final Federal agency action may not be taken sooner than 90 days from the issuance of the consistency determination to the State agency unless both the Federal agency and the State agency agree to an alternative period (see § 930.34(b)).

(*Comment.* The requirement in paragraph (c) is simply derived for the provision in § 930.34(b) which directs Federal agencies to provide State agencies with consistency information at least 90 days prior to the anticipated date of final approval of the Federal activity. This requirement is reiterated here to emphasize the opportunity for continued intergovernmental consultation in the event Federal and State agency concerns are not fully resolved within the 60-day period (45/15) of the State agency review.)

§ 930.42 State agency disagreement.

(a) In the event the State agency disagrees with the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the disagreement and supporting information. The State agency response must describe (1) how the proposed activity will be inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the management program.

(b) If the State agency's disagreement is based upon a finding that the Federal agency has failed to supply sufficient information (see § 930.39(a)), the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the Federal activity with the management program.

(c) State agencies shall send to the Assistant Administrator a copy of responses which describe disagreements with Federal agency consistency determinations.

(*Comment.* In the event of a disagreement, the Federal and State agencies should utilize the remaining portion of the 90-day notice period to attempt to resolve their differences. In cases of continuing State agency disagreement, Federal agencies are encouraged to suspend implementation of the activity beyond the 90-day period pending resolution of the disagreement.)

§ 930.43 Availability of mediation for disputes concerning proposed activities.

(a) In the event of a serious disagreement between a Federal agency and a State agency regarding the consistency of a proposed Federal activity directly affecting the coastal zone, either party may request the Secretarial mediation services provided for in Subpart G.

§ 930.44 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally approved activities in order to make certain that such activities continue to be undertaken in a manner consistent, to the maximum extent practicable, with the State's management program.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency's objection to a Federal activity which was: (i) previously determined to be consistent to the maximum extent practicable with the State's management program, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, is no longer consistent to the maximum extent practicable with the State's management program, or (ii) previously determined not to be a Federal activity directly affecting the coastal zone, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, the activity directly affects the coastal zone and is not consistent to the maximum extent practicable with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists, either party may request the Secretarial mediation services provided for in Subpart G.

Subpart D—Consistency for Activities Requiring a Federal License or Permit

§ 930.50 Objectives.

The provisions of this subpart are provided to assure that Federally licensed or permitted activities affecting the coastal zone are conducted in a manner consistent with approved management programs.

(*Comment.* Statutory citation: Subsection 307(c)(3)(A): "After final approval by the Secretary of a state's management program, any applicant for a required Federal license or permit to conduct an activity affecting land or water uses in the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state or its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed.")

§ 930.51 Federal license or permit.

(a) The term "Federal license or permit" means any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an applicant.

(*Comment.* All Federal leases are included within the definition of "Federal license or permit" with the exception of leases issued pursuant to the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.).)

(b) The term also includes the following types of renewals and major amendments which affect the coastal zone:

(1) Renewals and major amendments of Federal license and permit activities not previously reviewed by the State agency;

(2) Renewals and major amendments of Federal license and permit activities previously reviewed by the State agency which are filed after and are subject to management program amendments not in existence at the time of original State agency review; and

(3) Renewals and major amendments of Federal license and permit activities previously reviewed by the State agency which will cause coastal zone effects substantially different than those originally reviewed by the State agency.

(*Comment.* Paragraph (b) is founded on the principle that an applicant does not have a vested right to receive approval of a renewal or a major amendment without first complying with the law existing at the time approval is sought. However, this principle must operate in the context of avoiding unnecessary State agency review. Therefore, subparagraph (1) assures the State agency of an opportunity to review licenses and permits which were originally approved by the Federal government prior to management program approval and are subject to major amendment or renewal following management program approval. In the event the State agency has previously reviewed a license or permit activity, further review is limited to cases where changes in management program provisions necessitate reevaluation of the activity (subparagraph (2)), or the activity will be modified substantially causing new coastal zone effects (subparagraph (3)).)

§ 930.52 Applicant.

The term "applicant" means any individual, public or private corporation, partnership, association, or other entity organized or existing under the laws of any State, or any State, regional, or local government, who, following management program approval, files an application for a Federal license or permit to conduct an activity affecting the coastal zone. The term "applicant" does not include Federal agencies applying for Federal licenses or permits. Federal agency "activities" requiring Federal licenses or permits are subject to the consistency requirements of subpart C of this Part.

§ 930.53 Management program license and permit listing.

(a) During management program development, Federal agencies should assist State agencies in identifying Federal license and permit activities which reasonably can be expected to affect the coastal zone.

(b) State agencies shall develop a list of Federal license and permit activities which are likely to affect the coastal zone and which the State agency wishes to review for consistency with the management program. The list shall be included as part of the management program, and the Federal license and permit activities shall be described in terms of the specific licenses or permits involved (e.g., Corps of Engineers 404 permits, Coast Guard bridge permits, etc.). In the event the State agency chooses to review Federal licenses and permits for activities outside of the coastal zone but likely to affect the coastal zone, it must generally describe the geographic location of such activities.

(*Comment.* The location element should encompass only areas where Federal license and permit activities are likely to cause effects on coastal zone resources. For example, the management program could list a Federal land use permit (e.g., Forest Service right-of-way permits for logging roads) and require review whenever such a permit is requested along riverine areas where development is likely to affect downstream areas within the coastal zone. The State agency should exclude geographic areas outside of the coastal zone where Federal license and permit activities will not reasonably be expected to have impacts on coastal zone resources.)

(c) If a State agency wishes to avoid repeated review of minor Federally permitted activities which, while individually inconsequential, cumulatively cause effects on the coastal zone, the State agency, after developing conditions allowing concurrence for such activities, may issue a general public notice (see § 930.61) and general concurrence allowing similar minor work in the same geographic area to proceed without prior State agency review. In such cases, the State agency must set forth in the management program license and permit list the minor Federal license and permit activities and the relevent conditions which are covered by the general concurrence. Minor Federal license or permit activities which satisfy the conditions of the general concurrence are not subject to the consistency certification requirement of this subpart. Except in cases where the State agency indicates otherwise, copies of Federal license or permit applications for activities subject to a general concurrence must be sent by the applicant to the State agency to allow the State agency to monitor adherence to the conditions required by such concurrence. Confidential and proprietary material within such applications may be deleted.

(d) The license and permit list may be amended by the State agency following consultation with the affected Federal agency and approval of additions or deletions by the Assistant Administrator. The State agency shall provide copies of the list and any amendments to Federal agencies and shall make the information available to the public.

(*Comment.* States which have received Federal approval for management programs which do not contain a license and permit list must add the list to the management program.)

(e) No Federal license or permit described on an approved list shall be issued by a Federal agency until the requirements of this subpart have been satisfied. Federal agencies shall inform applicants for listed licenses and permits of the requirements of this subpart.

§ 930.54 Unlisted Federal license and permit activities.

(a) With the assistance of Federal agencies, State agencies should monitor unlisted Federal license and permit activities (e.g., by use of OMB Circular A-95 review, review of NEPA environmental impact statements, etc.) and shall immediately notify Federal agencies and applicants of unlisted activities affecting the coastal zone which require State agency review. State agencies must inform the Federal agency and applicant within 30 days from notice of the license or permit application, otherwise the State agency waives its right to review the unlisted activity. The waiver does not apply in cases where the State agency does not receive notice of the Federal license or permit activity.

(b) The State agency must also notify the Assistant Administrator of unlisted Federal license or permit activities which the State agency believes should be subject to State agency review. Following State agency notification to the Federal agency, applicant and the Assistant Administrator, the Federal agency may not issue the license or permit until the requirements of this Subpart have been satisfied, unless the Assistant Administrator disapproves the State agency decision to review the activity.

(c) The Federal agency and the applicant have 15 days from receipt of the State agency notice to provide comments to the Assistant Administrator regarding the State agency's decision to review the activity. The sole basis for the Assistant Administrator's approval or disapproval of the State agency's decision will relate to whether the proposed activity can be reasonably expected to affect the coastal zone of the State. The Assistant Administrator shall issue a decision, with supporting comments, to the State agency, Federal agency and applicant within 30 days from receipt of the State agency notice.

(d) In the event of disapproval by the Assistant Administrator, the Federal agency may approve the license or permit application and the applicant need not comply with the requirements of this subpart. If the Assistant Administrator approves the State agency's decision, the Federal agency and applicant must comply with the consistency certification procedures of this subpart.

(*Comment.* The procedures in this section are provided to ensure that State agencies are afforded an opportunity to review any Federal license or permit activity which reasonably can be expected to affect the coastal zone. The need for Assistant Administrator intervention will most likely occur only in borderline cases. Prior to bringing the issue before the Assistant Administrator, the concerned parties should consider whether or not the proposed activity, assuming it would affect the coastal zone, will be conducted in a manner consistent with the management program. If affirmative, further delay can be avoided by simply seeking the State agency's expeditious concurrence rather than attempting to avoid altogether State agency review. On the other hand, applicants should weigh this approach in connection with their right to be free from State agency review in cases where proposed Federal license and permit activities can-not reasonably be expected to affect the coastal zone.)

(e) Following an approval by the Assistant Administrator, the applicant shall amend the Federal application by including a consistency certification and shall provide the State agency with a copy of the certification along with necessary supporting data and information (see §§ 930.63 and 930.64). For the purposes of this section, concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection within six months from the originial Federal agency notice to the State agency (see paragraph (a) of this section) or within three months from receipt of the applicant's consistency certification and accompanying information, whichever period terminates last.

§ 930.55 Availability of mediation for license or permit disputes.

In the event of a serious disagreement between a Federal and State agency regarding whether a listed or unlisted Federal license or permit activity is subject to consistency review, either party may request the Secretarial mediation services provided for in subpart G; notice shall be provided to the applicant. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding approval of a license or permit application for an activity on an approved management program list (see § 930.53) or individually approved by the Assistant Administrator (see § 930.54) pending satisfaction of the requirements of this subpart. Similarly, the existence of a serious disagreement will not prevent the Federal agency from approving a license or permit activity which has not received Assistant Administrator approval.

§ 930.56 State agency guidance and assistance to applicants; information requirements.

(a) As a preliminary matter, any applicant for a Federal license or permit selected for review by a State agency should obtain the views and assistance of that agency regarding the means for ensuring that the proposed activity will be conducted in a manner consistent with the State's management program. As part of its assistance efforts, the State agency shall make available for public inspection copies of the management program document.

(b) The management program as originally approved or amended may describe requirements regarding the data and information necessary to assess the consistency of Federal license and permit activities. Required data and information may not include confidential and proprietary material. In the case of approved amendments, State agencies shall send copies to relevant Federal agencies who shall, in turn, provide the information requirements to applicants. If a State does not choose to develop or amend its management program to include information requirements, the applicant must, at a minimum, supply the State agency with the information required by § 930.58.

(*Comment.* Necessary information and data may include State or local government permits which are required in addition to the Federal license or permit. If this measure is adopted, the State agency may declare in the management program that following the issuance of the required public notice (see § 930.61) concurrence will be granted based upon the applicant's receipt of the State or local government permits.)

§930.57 Consistency certifications.

(a) When satisfied that the proposed activity meets the Federal Consistency requirements of this subpart, all applicants for Federal licenses or permits subject to State agency review shall provide in the application to the Federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the State's approved management program. At the same time, the applicant shall furnish to the State agency a copy of the certification.

(b) The applicant's consistency certification shall be in the following form: "The proposed activity complies with (name of State) approved coastal management program and will be conducted in a manner consistent with such program."

§ 930.58 Necessary data and information.

(a) The applicant shall furnish the State agency with necessary data and information along with the consistency certification. Such information and data shall include the following:

(1) A detailed description of the proposed activity and its associated facilities which is adequate to permit an assessment of their probable coastal zone effects. Maps, diagrams, technical data and other relevant material must be submitted when a written description alone will not adequately describe the proposal (a copy of the Federal application and all supporting material provided to the Federal agency should also be submitted to the State agency).

(2) Information required by the State agency pursuant to § 930.56(b).

(3) A brief assessment relating the probable coastal zone effects of the proposal and its associated facilities to the relevant elements of the management program.

(4) A brief set of findings, derived from the assessment, indicating that the proposed activity (e.g., project siting and construction), its associated facilities (e.g., access road, support buildings), and their effects (e.g., air, water, waste discharges, erosion, wetlands, beach access impacts) are all consistent with the provisions of the management program. In developing findings, the applicant shall give appropriate weight to the various types of provisions within the management program. While applicants must be consistent with the enforceable, mandatory policies of the management program, they need only demonstrate adequate consideration of policies which are in the nature of recommendations. Applicants need not make findings with respect to coastal zone effects for which the management program does not contain mandatory or recommended policies.

(*Comment.* Although nonassociated facilities must be included within the description of coastal zone effects of the activity, the applicant is not responsible for assessing the consistency of such facilities—see § 930.21.)

(b) At the request of the applicant, interested parties who have access to information and data required by subparagraphs (a) (1) and (2) of this section may provide the State agency with all or part of the material required. Furthermore, upon request by the applicant, the State agency shall provide assistance for developing the assessment and findings required by paragraphs (a) (3) and (4) of this section.

(c) When satisfied that adequate protection against public disclosure exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposal.

§ 930.59 Multiple permit review.

(a) Applicants shall, to the extent practicable, consolidate related Federal license and permit activities affecting the coastal zone for State agency review. State agencies shall, to the extent practicable, provide applicants with a "one-stop" multiple permit review for consolidated permits to minimize duplication of effort and to avoid unnecessary delays.

(b) A State agency objection to one or more of the license or permit activities submitted for consolidated review shall not prevent the applicant from receiving Federal agency approval for those license and permit activities found to be consistent with the management program.

§ 930.60 Commencement of State agency review.

(a) Except as provided in § 930.54(e), State agency review of an applicant's consistency certification begins at the time the State agency receives a copy of the consistency certification, and the information and data required pursuant to § 930.58.

(b) A State agency request for information or data in addition to that required by § 930.58 shall not extend the date of commencement of State agency review.

§ 930.61 Public notice.

(a) Following receipt of the material described in § 930.60 the State agency shall ensure timely public notice of the proposed activity. At a minimum the provision of public notice must be in accordance with State law. In addition, public notice must be provided in the immediate area of the coastal zone which is likely to be affected by the proposed activity. Public notice shall be expanded in proportion to the degree of likely public interest resulting from the unique geographic area involved, the substantial commitment of or impact on coastal resources, the complexity or controversy of the proposal, or for other good cause.

(b) Public notice shall facilitate public comment by providing a summary of the proposed activity, by announcing the availability for inspection of the consistency certification and accompanying public information and data, and by requesting that comments be submitted to the State agency.

(c) A number of procedural options, if permitted by State law, are available to State agencies to satisfy the public notice requirements of this Subpart. They include, but are not limited to:

(1) the State agency providing the public notice;

(2) the State agency requiring the applicant to provide the public notice; or

(3) the State agency relying upon the public notice provided by the Federal agency reviewing the application for the Federal license or permit (e.g., A-95 public notices, notice of availability of NEPA environmental impact statements) if such notice satisfies the minimum requirements set forth in paragraphs (a) and (b) of this section.

(d) Federal and State agencies are encouraged to issue joint public notices whenever possible to minimize duplication of effort and to avoid unnecessary delays.

§ 930.62 Public hearings.

(a) At the discretion of the State agency, public notice may include the announcement of one or more public hearings. Public hearings shall be scheduled with a view towards (1) allowing access to the consistency certification and accompanying public information within a reasonable time prior to the hearing, (2) facilitating broad public attendance and participation at the hearing, and (3) affording the applicant expeditious consideration of the proposed activity.

(b) Federal and State agencies are encouraged to hold joint public hearings in the event both agencies determine that a hearing on the action is necessary.

§ 930.63 State agency concurrence with a consistency certification.

(a) At the earliest practicable time, the State agency shall notify the Federal agency and the applicant whether the State agency concurs with or objects to a consistency certification. Concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection within six months following commencement of State agency review.

(b) State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to inform the public, obtain sufficient comment, and develop a reasonable decision on the matter. If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the applicant and the Federal agency of the status of the matter and the basis for further delay.

(c) If the State agency issues a concurrence or is conclusively presumed to concur with the applicant's consistency certification, the Federal agency may approve the Federal license or permit application. Notwithstanding State agency concurrence with a consistency certification, the Federal permitting agency may deny approval of the Federal license or permit application. Federal agencies should not delay processing applications pending receipt of a State agency's concurrence. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant and the State agency.

(*Comment*: Concurrent review of a proposal will complement the consistency review process and minimize time delays. The early notification of a Federal agency's intent to deny approval for an application will preclude the need for further State agency review.)

§ 930.64 State agency objection to a consistency certification.

(a) If the State agency objects to the applicant's consistency certification within six months following commencement of review, it shall notify the applicant, Federal agency and Assistant Administrator of the objection.

(b) State agency objections must describe (1) how the proposed activity is inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program.

(c) During the period when the State agency is reviewing the consistency certification, the applicant and the State agency should attempt to agree upon conditions, which, if met by the applicant, would permit State agency concurrence. The parties shall also consult with the Federal agency responsible for approving the Federal license or permit to ensure that proposed conditions satisfy Federal as well as State management program requirements.

(d) A State agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to § 903.58. If the State agency objects on the grounds of insufficient information, the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program.

(e) A State agency objection shall include a statement informing the applicant of a right of appeal to the Secretary on the grounds described in Subpart H.

§ 930.65 Federal permitting agency responsibility.

Following receipt of a State agency objection to a consistency certification, the Federal agency shall not issue the Federal license or permit except as provided in Subpart H of this part.

§ 930.66 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally licensed and permitted activities in order to make certain that such activities continue to conform to both Federal and State requirements.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency objection to a Federally licensed or permitted activity which was: (1) Previously determined to be consistent with the State's management program, but which the State agency later maintains is being conducted or is having coastal zone effects substantially different than originally proposed and, as a result, is no longer consistent with the State's management program; or (2) previously determined not to be an activity affecting the coastal zone, but which the State agency later maintains is being conducted or is having coastal effects substantially different than originally proposed and, as a result, the activity affects the coastal zone in a manner inconsistent with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action; a copy of the request must be sent to the applicant.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists with the Federal agency, either party may seek the Secretarial mediation services provided for in Subpart G of this part.

Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities

§ 930.70 Objectives.

The provisions of this subpart are provided to assure that all Federal license and permit activities described in detail in OCS plans and which affect the coastal zone are conducted in a manner consistent with approved coastal zone management programs.

(*Comment*. Statutory citation: Subsection 307(c)(3)(B):

"After the management program of any coastal state has been approved by the Secretary under Section 306, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331, et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan together with any other necessary data and information, and until:

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed, as provided for in subparagraph (A), except if such state fails to concur with or object to such certification within three months after receipt of its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate Federal agency, and such person with a written statement describing the status of review and the basis for further delay in issuing a final decision, and if such statement is not so provided, concurrence by such state with such certification shall be conclusively presumed; * * *

"If a state concurs or is conclusively presumed to concur, * * *, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence * * * applies, if such state objects to such certification, * * * of if such person fails substantially to comply with such plan, as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.")

§ 930.71 Federal license or permit activity described in detail.

The term "Federal license or permit activity described in detail" means any activity requiring a Federal license or permit, as defined in § 930.51, which the Secretary of the Interior determines must be described in detail within an OCS plan.

(*Comment.* The Department of the Interior's OCS prelease sale "activities," such as determination of tracts to be offered and choice of lease sale stipulations, are subject to the requirements of Subpart C. OCS plan Federal license and permit activities which are not required to be described in detail in the plan are subject to the requirements of Subpart D.)

§ 930.72 Person.

The term "person" means any individual, corporation, partnership, association, or other entity organized or existing under the laws of any State, the Federal government, any State, regional, or local government, or any entity of such Federal, State, regional or local government, who submits to the Secretary of the Interior, or designee following management program approval, an OCS plan which describes in detail Federal license or permit activities.

§ 930.73 OCS plan.

(a) The term "OCS plan" means any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. Sec. 1331 et seq.), and the regulations under that Act, which is submitted to the Secretary of the Interior or designee following management program approval and which describes in detail Federal license or permit activities.

(b) The requirements of this subpart do not apply to Federal license and permit applications filed after management program approval for activities described in detail in OCS plans approved by the Secretary of the Interior or designee prior to management program approval.

§ 930.74 OCS activities subject to State agency review.

Except for States which do not anticipate coastal zone effects resulting from OCS activities, management program lists required pursuant to § 930.53 shall include a reference to OCS plans which describe in detail Federal license and permit activities affecting the coastal zone.

§ 930.75 State agency assistance to persons; information requirements.

(a) As a preliminary matter, any person intending to submit to the Secretary of the Interior and OCS plan which describes in detail Federal license or permit activities affecting the coastal zone should obtain the views and assistance of the State agency regarding the means for ensuring that such activities will be conducted in a manner consistent with the State's management program. As part of its assistance efforts, the State agency shall make available for inspection copies of the management program document.

(b) In accordance with the provisions in § 930.56(b), the management program as originally approved or amended may describe requirements regarding data and information which will be necessary for the State agency to assess the consistency of the Federal license and permit activities described in detail in OCS plans.

§ 930.76 Submission of an OCS plan and consistency certification.

Any person submitting to the Secretary of the Interior or designee any OCS plan shall:

(a) Identify all activities described in detail in the plan which are subject to State agency review;

(b) When satisfied that the proposed activities meet the Federal consistency requirements of this Subpart, provide the Secretary of the Interior or designee with a consistency certification, attached to the OCS plan, and the Secretary of the Interior or designee shall furnish the State agency a copy of the OCS plan (excluding proprietary information) and consistency certification.

(c) The person's consistency certification shall be in the following form:

The proposed activities described in detail in this plan comply with (name of State(s)) approved coastal management program(s) and will be conducted in a manner consistent with such program(s).

§ 930.77 Necessary data and information.

(a) The State agency shall use the information received pursuant to the Department of the Interior's operating regulations governing exploration, development and production operations on the OCS (see 30 CFR § 250.34) and regulations pertaining to the OCS information program (see 30 CFR Part 252) to determine the consistency of proposed Federal license and permit activities described in detail in OCS plans.

(b) The person shall supplement the information provided by paragraph (a) of this section by supplying the State agency with:

(1) Information required by the State agency pursuant to § 930.75(b).

(2) A brief assessment relating the probable coastal zone effects of the activities and their associated facilities to the relevant elements of the management program, and

(3) A brief set of findings, derived from the assessment, indicating that each of the proposed activities (e.g., drilling, platform placement) and their associated facilities (e.g., onshore support structures, offshore pipelines), and their effects (e.g., air, water, waste discharge, erosion, wetlands, beach access impacts) are all consistent with the provisions of the management program. In developing findings, the person shall give appropriate weight to the various provisions within the management program in accordance with the guidance provided in § 930.58(a)(4).

(*Comment.* Although nonassociated facilities must be included within the description of coastal zone effects of the activities, the person is not responsible for assessing the consistency of such facilities.)

(c) At the request of the person, interested parties who have access to information required by paragraphs (a) and (b)(1) of this section may provide the State agency with all or part of the material required. Furthermore, upon request by the person, the State agency shall provide assistance for developing the assessment and findings required by paragraphs (b) (2) and (3) of this section.

(d) When satisfied that adequate protection against public disclosure exists, persons should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposed activities. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposed activities.

§ 930.78 Commencement of State agency review; public notice.

(a) State agency review of the person's consistency certification begins at the time the State agency receives a copy of the OCS plan, consistency certification, and required necessary data and information. A State agency request for information and data in addition to that required by § 930.77 shall not extend the date of commencement of State agency review.

(b) Following receipt of the material described in paragraph (a) of this section, the State agency shall ensure timely public notice of the proposed activities in accordance with the directives within §§ 930.61–930.62.

§ 930.79 State agency concurrence or objection.

(a) At the earliest practicable time, the State agency shall notify the person, the Secretary of the Interior or designee and the Assistant Administrator of its concurrence with or objection to the consistency certification. State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to inform the public, obtain sufficient comment, and develop a reasonable decision on the matter. If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the person, the Secretary of the Interior or designee and the Assistant Administrator of the status of review and the basis for further delay in issuing a final decision. Notice shall be in written form and postmarked no later than three months following the State agency's receipt of the certification and supporting information. Concurrence by the State agency shall be conclusively presumed if the notification required by this subparagraph is not provided.

(b) Concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection to the consistency certification within six months following commencement of State agency review.

(c) If the State agency objects to one or more of the Federal license or permit activities described in detail in the OCS plan, it must provide a separate discussion for each objection in accordance with the directives within § 930.64 (b) and (d). The objection shall also include a statement informing the person of a right of appeal to the Secretary on the grounds described in Subpart H.

(*Comment:* Except for the requirements for State agencies to take certain actions within three months and to inform the Secretary of the Interior or designee of consistency decisions, the provisions in this section are comparable to those described in §§ 930.63–930.64).

§ 930.80 Effect of State agency concurrence.

(a) If the State agency issues a concurrence or is conclusively presumed to concur with the person's consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time Federal applications are actually filed for the Federal licenses and permits to which such concurrence applies.

(b) Unless the State agency indicates otherwise, copies of Federal license and permit applications for activities described in detail in an OCS plan which has received State agency concurrence shall be sent by the person to the State agency to allow the State agency to monitor the activities. Confidential and proprietary material within such applications may be deleted.

§ 930.81 Federal permitting agency responsibility.

Following receipt of a State agency objection to a consistency certification related to Federal license or permit activities described in detail in an OCS plan, the Federal agency shall not issue any of such licenses or permits except as provided in Subpart H of this part.

§ 930.82 Multiple permit review.

(a) A person submitting a consistency certification for Federal license or permit activities described in detail in an OCS plan is strongly encouraged to work with other Federal agencies in an effort to include, for consolidated State agency review, consistency certifications and supporting data and information applicable to OCS-related Federal license and permit activities affecting the coastal zone which are not required to be described in detail in OCS plans but which are subjected to State agency consistency review (e.g., Corps of Engineer permits for the placement of structures on the OCS and for dredging and the transportation of dredged material, Environmental Protection Agency air and water quality permits for offshore operations and onshore support and processing facilities, etc.). In the event the person does not consolidate such OCS-related permit activities with the State agency's review of the OCS plan, such activities will remain subject to individual State agency review under the requirements of Subpart D of this part.

(*Comment.* Persons are encouraged to consolidate permits for State agency review as this process can (i) minimize the delay in the review and approval of both OCS plan and OCS-related Federal licenses and permits, (ii) provide the State agency with comprehensive information on all aspects of OCS operations, thereby assisting the State in planning for and managing these activities, and (iii) provide the person with added certainty regarding the manner in which all OCS operations may proceed consistent with the management program.)

(b) A State agency objection to one or more of the OCS-related Federal license or permit activities submitted for consolidated review shall not prevent the person from receiving Federal agency approval (1) for those OCS-related license or permit activities found by the State agency to be consistent with the management program, and (2) for the license and permit activities described in detail in the OCS plan provided the State agency concurs with the consistency certification for such plan. Similarly, a State agency objection to the consistency certification for an OCS plan shall not prevent the person from receiving Federal agency approval for those OCS-related license or permit activities determined by the State agency to be consistent with the management program.

§ 930.83 Amended or new OCS plans.

If the State agency objects to the person's OCS plan consistency certification, and if, pursuant to subpart H, the Secretary does not determine that each of the objected to Federal license or permit activities described in detail in such plan is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the person shall submit an amended or new plan to the Secretary of the Interior or designee and to the State agency along with a consistency certification and data and information necessary to support the new consistency determination. The data and information shall specifically describe modifications made to the original OCS plan, and the manner in which such modifications will ensure that all of the proposed Federal license or permit activities described in detail in the amended or new plan will be conducted in a manner consistent with the State's management program.

§ 930.84 Review of amended or new OCS plans; public notice.

(a) After receipt of a copy of the amended or new OCS plan, consistency certification, and accompanying data and information, State agency review shall begin.

(b) Following receipt of the material described in paragraph (a) of this section, the State agency shall ensure timely public notice of the proposed activities in accordance with the directives within §§ 930.61–930.62.

(c) The State agency shall concur with or object to the person's consistency certification in accordance with the directives within § 930.79, except that the applicable time period for purposes of concurrence by conclusive presumption shall be three months instead of six months.

(d) If the State agency issues a concurrence or is conclusively presumed to concur with the person's new consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time Federal applications are actually filed for the Federal licenses and permits to which such concurrence applies.

(e) Unless the State agency indicates otherwise, copies of Federal license and permit applications for activities described in detail in an amended or new OCS plan which has received State agency concurrence shall be sent by the person to the State agency to allow the State agency to monitor the activities. Confidential and proprietary material within such applications may be deleted.

§ 930.85 Continuing State agency objections.

If the State agency objects to the consistency certification for an amended or new OCS plan, the prohibition in § 930.81 against Federal agency approval of licenses or permits for activities described in detail in such a plan applies, further Secretarial review pursuant to subpart H may take place, and the development of an additional amended or new OCS plan and consistency certification may be required pursuant to §§ 930.83–930.84.

§ 930.86 Failure to comply substantially with an approved OCS plan.

(a) The Department of the Interior and State agencies shall cooperate in their efforts to monitor Federally licensed and permitted activities described in detail OCS plans to make certain that such activities continue to conform to both Federal and State requirements.

(b) If a State agency claims that a person is failing substantially to comply with an approved OCS plan subject to the requirements of this Subpart, and such failure allegedly involves the conduct of activities affecting the coastal zone in a manner that is not consistent with the approved management program, the State agency shall transmit its claim to the U.S. Geological Survey supervisor for the area involved. Such claim shall include: (1) A description of the specific activity involved and the alleged lack of compliance with the OCS plan, and (2) a request for appropriate remedial action. A copy of the claim shall be sent to the person and the Assistant Administrator.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that the person is failing to comply substantially with the OCS plan, the governor or section 306(c)(5) State agency (see § 930.18) may file a written objection with the Secretary. If the Secretary finds that the person is failing to comply substantially with the OCS plan, the person shall submit an amended or new OCS plan along with a consistency certification and supporting information to the Secretary of the Interior or designee and to the State agency. Following such a finding by the Secretary, the person shall comply with the originally approved OCS plan, or with interim orders issued jointly by the Secretary and the U.S. Geological Survey, pending approval of the amended or new OCS plan. The directives within §§ 930.83–930.85 shall apply to further State agency review of the consistency certification for the amended or new plan.

(d) A person shall be found to have failed substantially to comply with an approved OCS plan if the State agency claims and the Secretary finds that one or more of the activities described in detail in the OCS plan which affects the coastal zone are being conducted or are having a coastal zone effect substantially different than originally described by the person in the plan or accompanying information and, as a result, the activities are no longer being conducted in a manner consistent with the State's management program. The Secretary may make a finding that a person has failed substantially to comply with an approved OCS plan only after providing a reasonable opportunity for the person and the Secretary of the Interior to review the State agency's objection and to submit comments for the Secretary's consideration.

Subpart F—Consistency for Federal Assistance to State and Local Governments

§ 930.90 Objectives.

The provisions of this subpart are provided to assure that Federal assistance to State and local governments for activities affecting the coastal zone is granted only when such activities are consistent with approved coastal zone managements programs.

(*Comment*. Statutory citation: Section 307(d):

"State and local governments submitting applications for Federal assistance under other Federal programs affecting the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of title IV of the Intergovernmental Cooperation Act of 1968 (82 Stat. 1098) [which provides authority for the Office of Management and Budget Circular A–95 (41 FR 2052 (1976))]. Federal agencies shall not approve proposed projects that are inconsistent with a coastal state's management program * * *."

Although the Coastal Energy Impact Program (CEIP) under Section 308 of the Act is not a form of Federal assistance under an "other Federal" program, it will be the policy of OCZM to subject the CEIP to the consistency requirements of this Subpart.)

§ 930.91 Federal assistance.

The term "Federal assistance" means assistance provided under a Federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid.

§ 930.92 Applicant agency.

The term "applicant agency" means any unit of State or local government, or any related public entity such as a special purpose district, which, following management program approval, submits an application for Federal assistance.

§ 930.93 OMB A–95 process.

The term "OMB A–95 process" describes the project notification and review procedures set forth in the Office of Management and Budget Circular A–95 for the evaluation, review and coordination of Federally assisted programs (41 FR 2052 (1976)).

§ 930.94 Guidance provided by the State agency.

(a) To assist A–95 State and areawide clearinghouses, State agencies should include within the management program a listing of specific types of Federal assistance programs subject to a consistency review. Such a listing, and any amendments, will require prior 306(c)(5) state agency (see § 930.18) consultation with affected Federal agencies and approval by the Assistant Administrator.

(b) In the event the State agency chooses to review applications for Federal assistance activities outside of the coastal zone but likely to affect the coastal zone, the State agency must develop a Federal assistance provision within the management program generally describing the geographic area (e.g. coastal floodplains) within which Federal assistance activities will be subject to review. This provision, and any refinements, will require prior 306(c)(5) State agency consultation with affected Federal agencies and approval by the Assistant Administrator.

(c) The State agency shall provide copies of any Federal assistance list or geographic provision, and any refinements, to Federal agencies, units of State or local government empowered to undertake Federally assisted activities within the coastal zone or described geographic area, and to the A-95 State and areawide clearinghouses.

§ 930.95 OMB A-95 project notification and review.

(a) Pursuant to the OMB A-95 process, an applicant agency shall notify the appropriate State and areawide clearinghouses of its intent to apply for Federal assistance for an activity located in the coastal zone or the described geographic area.

(b) The applicant agency shall utilize the OMB A-95 process for every major funding phase of the Federal assistance activity which entails the consideration of new information not previously reviewed (e.g., planning and design data not reviewed in earlier project siting phase), or which results in substantial modifications to previously reviewed phases.

(c) The clearinghouses shall ensure that the State agency is afforded an opportunity to review a notification for an activity located in the coastal zone or the described geographic area to determine whether the activity is consistent with the management program.

§ 930.96 Consistency review.

(a) If pursuant to the OMB A-95 process, the State agency does not object to the proposed activity, the Federal agency may grant the Federal assistance to the applicant agency. Notwithstanding State agency consistency approval for the proposed project, the Federal agency may deny assistance to the applicant agency. Federal agencies should not delay processing applications pending receipt of a State agency approval or objection. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant agency and the State agency.

(b) If pursuant to the OMB A-95 process, the State agency objects to the proposed project, the clearinghouse shall notify the applicant agency, Federal agency and the Assistant Administrator of the objection.

(c) State agency objections must describe: (1) how the proposed project is inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the applicant agency, would permit the proposed project to be conducted in a manner consistent with the management program.

(d) A State agency objection may be based upon a determination that the applicant agency has failed, following a written State agency request, to supply necessary information. If the State agency objects on the grounds of insufficient information, the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program.

(e) State agency objections shall include a statement informing the applicant agency of a right of appeal to the Secretary on the grounds described in subpart H of this part.

§ 930.97 Federal assisting agency responsibility.

Following receipt of a State agency objection, the Federal agency shall not approve assistance for the activity except as provided in subpart H of this part.

§ 930.98 Federally assisted activities outside of the coastal zone or the described geographic area.

(a) State agencies should monitor proposed Federal assistance activities outside of the coastal zone or the described geographic area (e.g., by use of the OMB A-95 process, review of NEPA environmental impact statements, etc.) and shall immediately notify applicant agencies, Federal agencies, and the appropriate clearinghouse of proposed activities which can reasonably be expected to affect the coastal zone and which the State agency is reviewing for consistency with the management program. Notification shall also be sent by the State agency to the Assistant Administrator. State agencies must inform the clearinghouse and other parties of objections within the time period permitted under the OMB A-95 process, otherwise the State agency waives its right to object to the proposed activity.

(b) If within the permitted time period the State agency notifies the Federal agency of its objection to a proposed Federally assisted activity, the Federal agency shall not provide assistance to the applicant agency except as provided in Subpart H, unless the Assistant Administrator disapproves the State agency's decision to review the activity. The Assistant Administrator shall be guided by the provisions in § 930.54 (c) and (d).

§ 930.99 Availability of mediation for Federal assistance disputes.

In the event of a serious disagreement between a Federal and State agency regarding whether a Federal assistance activity is subject to consistency review, either party may request the Secretarial mediation services provided for in Subpart G of this Part. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding Federal assistance for the activity pending satisfaction of the requirements of this subpart, except in cases where the Assistant Administrator has disapproved a State agency decision to review an activity.

§ 930.100 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally assisted activities in order to make certain that such activities continue to conform to both Federal and State requirements.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency objection to a Federally assisted activity which was (1) previously determined to be consistent with the State's management program, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, is no longer consistent with the State management program, or (2) previously determined not to be a project affecting the coastal zone, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result the project affects the coastal zone in a manner inconsistent with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action; a copy of the request must be sent to the applicant agency.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists with the Federal agency, either party may seek the Secretarial mediation services provided for in Subpart G of this Part.

Subpart G—Secretarial Mediation

§ 930.110 Objectives.

The purpose of this subpart is to describe mediation procedures which Federal and State agencies may use to attempt to resolve serious disagreements which arise during the administration of approved management programs.

(*Comment.* Statutory citation: Section 307(h):

"In case of serious disagreement between any Federal agency and coastal state * * *

"(2) in the administration of management programs approved under Section 306; the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.")

§ 930.111 Informal negotiations.

The availability of mediation does not preclude use by the parties of alternative means for resolving their disagreement. In the event a serious disagreement arises, the parties are strongly encouraged to make every effort to resolve the disagreement informally. OCZM shall be available to assist the parties in these efforts.

§ 930.112 Request for mediation.

(a) The Secretary or other head of a Federal agency, or the Governor or the section 306(c)(5) State agency (see § 930.18), may notify the Secretary in writing of the existence of a serious disagreement, and may request that the Secretary seek to mediate the serious disagreement. A copy of the written request must be sent to the agency with which the requesting agency disagrees, and to the Assistant Administrator.

(b) Within 15 days following receipt of a request for mediation the disagreeing agency shall transmit a written response to the Secretary, and to the agency requesting mediation, indicating whether it wishes to participate in the mediation process. If the disagreeing agency declines the offer to enter into mediation efforts, it must indicate the basis for its refusal in its response. Upon receipt of a refusal to participate in mediation efforts, the Secretary shall seek to persuade the disagreeing agency to reconsider its decision and enter into mediation efforts. If the disagreeing agencies do not all agree to participate, the Secretary will cease efforts to provide mediation assistance.

§ 930.113 Public hearings.

(a) If the parties agree to the mediation process, the Secretary shall appoint a hearing officer who shall schedule a hearing in the local area concerned. The hearing officer shall give the parties at least 30 days notice of the time and place set for the hearing and shall provide timely public notice of the hearing.

(b) At the time public notice is provided, the Federal and State agencies shall provide the public with convenient access to public data and information related to the serious disagreement.

(c) Hearings shall be informal and shall be conducted by the hearing officer with the objective of securing in a timely fashion information related to the disagreement. The Federal and State agencies, as well as other interested parties, may offer information at the hearing subject to the hearing officer's supervision as to the extent and manner of presentation. Unduly repetitious oral presentation may be excluded at the discretion of the hearing officer; in the event of such exclusion the party may provide the hearing officer with a written submission of the proposed oral presentation. Hearings will be recorded and the hearing officer shall provide transcripts and copies of written information offered at the hearing to the Federal and State agency parties. The public may inspect and copy the transcripts and written information provided to these agencies.

§ 930.114 Secretarial mediation efforts.

(a) Following the close of the hearing, the hearing officer shall transmit the hearing record to the Secretary. Upon receipt of the hearing record, the Secretary shall schedule a mediation conference to be attended by representatives from the Office of the Secretary, the disagreeing Federal and State agencies, and any other interested parties whose participation is deemed necessary by the Secretary. The Secretary shall provide the parties at least 10 days notice of the time and place set for the mediation conference.

(b) Secretarial mediation efforts shall last only so long as the Federal and State agencies agree to participate. The Secretary shall confer with the Executive Office of the President, as necessary, during the mediation process.

§ 930.115 Termination of mediation.

Mediation shall terminate (a) at any time the Federal and State agencies agree to a resolution of the serious disagreement, (b) if one of the agencies withdraws from mediation, (c) in the event the agencies fail to reach a resolution of the serious disagreement within 15 days following Secretarial conference efforts, and the agencies do not agree to extend mediation beyond that period, or (d) for other good cause.

§ 930.116 Judicial review.

The availability of the mediation services provided in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart.

Subpart H—Secretarial Review Related to the Objectives or Purposes of the Act and National Security Interests

§ 930.120 Objectives.

The provisions of this subpart provide procedures by which the Secretary may find that a Federal license or permit activity, including those described in detail in an OCS plan, or a Federal assistance activity, which is inconsistent with a management program, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.

(*Comment.* Statutory citations: Subsection 307(c)(3)(A):

"No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with objectives of this title or is otherwise necessary in the interest of national security."

Subsection 307(c)(3)(B):

"No Federal official or agency shall grant such person any license or permit for any activity described in detail in such [OCS] plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

"(i) The State agency concurs;

"(ii) The State agency is conclusively presumed to concur; or

"(iii) The Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security."

Section 307(d):

"Federal agencies shall not approve proposed projects that are inconsistent with a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this title or necessary in the interest of national security."

§ 930.121 Consistent with the objectives or purposes of the act.

The term "consistent with the objectives or purposes of the Act" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because it satisfies the following four requirements:

(a) The activity furthers one or more of the competing national objectives or purposes contained in sections 302 or 303 of the Act,

(b) When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest,

(c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and

(d) There is no reasonable alternative available (e.g., location design, etc.) which would permit the activity to be conducted in a manner consistent with the management program.

§ 930.122 Necessary in the interest of national security.

The term "necessary in the interest of national security" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed. Secretarial review of national security issues shall be aided by information submitted by the Department of Defense or other interested Federal agencies. The views of such agencies, while not binding, shall be given considerable weight by the Secretary. The Secretary will seek information to determine whether the objected-to activity directly supports national defense or other essential national security objectives.

§ 930.123 Appellant.

The term "appellant" refers to an applicant, person or applicant agency submitting an appeal to the Secretary pursuant to the provisions of this subpart.

§ 930.124 Informal discussions.

In the event the State agency informs the applicant, person or applicant agency that it intends to object to the proposed activity, the parties should consult informally to attempt to resolve the matter in a manner which avoids the necessity of appealing the issue to the Secretary. OCZM shall be available to assist the parties in these discussions.

§ 930.125 Appeals to the Secretary.

(a) An appellant may file a notice of appeal with the Secretary with 30 days of the appellant's receipt of a State agency objection. The notice of appeal shall be accompanied by a statement in support of the appellant's position, along with supporting data and information. The appellant shall send a copy of the notice of appeal and accompanying documents to the Federal and State agencies involved.

(b) No extension of time will be permitted for the filing of a notice of appeal.

(c) The Secretary may approve a reasonable request for an extension of time to submit supporting information so long as the request is filed with the Secretary within the 30-day period. Normally, the Secretary shall limit an extension period to 15 days.

§ 930.126 Federal and State agency responses to appeals.

(a) Upon receipt of the notice of appeal and supporting information, the Federal and State agencies shall have 30 days to submit detailed comments to the Secretary. Copies of such comments shall be sent to the appellant and other agency within the same time period.

(b) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.127 Public notice; receipt of comments.

(a) The Secretary shall provide timely public notice of the appeal within 15 days of receipt of the notice. At a minimum, public notice shall be provided in the immediate area of the coastal zone which is likely to be affected by the proposed activity. At the time public notice is provided, the Federal and State agencies shall provide the public with convenient access to copies of the appellant's notice of appeal and accompanying public information, and to the public information in the agencies' detailed comments.

(b) Interested persons may submit comments to the Secretary within 30 days from the date of public notice, with copies provided to the appellant and to the Federal and State agencies within the same time period.

(c) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.128 Dismissal of appeals.

The Secretary may dismiss an appeal for good cause. Good cause shall include, but is not limited to:

(a) Failure of the appellant to submit a notice of appeal within the required 30-day period.

(b) Failure of the appellant to submit the supporting information within the required period or approved extension period;

(c) Secretarial receipt of a detailed comment from the Federal agency stating that the agency has disapproved the Federal license, permit or assistance application;

(d) Failure of the appellant to base the appeal on grounds that the proposed activity either (1) is consistent with the objectives or purposes of the Act or (2) is necessary in the interest of national security.

§ 930.129 Public hearings.

The Secretary may order a hearing independently or in reponse to a request. If a hearing is ordered by the Secretary it shall be guided by the procedures described within § 930.113.

§ 930.130 Secretarial review.

(a) In reviewing an appeal, the Secretary shall find that a proposed Federal license or permit activity, or a Federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, when the information submitted supports this conclusion.

(b) The Secretary shall make all reasonable efforts to complete consideration of an appeal within 90 days from the date of public notice.

(c) Following consideration of the appeal, the Secretary shall issue a decision in writing to the appellant and to the Federal and State agencies indicating whether the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security; the decision shall include the basis for such finding. The Secretary shall provide public notice of the decision.

(d) The decision of the Secretary shall constitute final agency action for the purposes of the Administrative Procedure Act.

§ 930.131 Federal agency responsibility.

(a) If the Secretary finds that the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the Federal agency may approve the activity.

(b) If the Secretary does not make either of these findings, the Federal agency shall not approve the activity.

§ 930.132 Review initiated by the Secretary.

(a) The Secretary may choose to consider whether a Federal license or permit activity, or a Federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security. Secretarial review may be initiated either before of after the completion of State agency review. The Secretary's decision to review the activity may result from an independent concern regarding the activity or a request from interested parties. If the Secretary decides to initiate review, notification shall be sent to the applicant, person or applicant agency, and to the Federal and State agencies. The notice shall include a statement describing the reasons for the review and shall contain a request for submission of detailed comments to be submitted within 30 days from receipt of the notification. Copies of comments shall be exchanged among the parties.

(b) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.133 Public notice; receipt of comments; public hearings.

(a) Upon receipt of detailed comments from the parties, the Secretary shall provide public notice and request public comments in accordance with the provisions in § 930.127.

(b) The Secretary may order a hearing in accordance with the provisions in § 930.129.

§ 930.134 Secretarial review; Federal agency responsibility.

(a) Secretarial review shall be undertaken in accordance with the provisions in § 930.130.

(b) Federal agencies are responsible for adhering to the provisions in § 930.131 when deciding to approve or deny an application for an activity objected to by a State agency and independently reviewed by the Secretary.

Subpart I—Assistant Administrator Reporting and Continuing Review of Federal Actions Subject to the Federal Consistency Requirements

§ 930.140 Objectives.

The provisions of this subpart provide procedures to permit interested parties to notify the Assistant Administrator of Federal actions (a) believed to be inconsistent with an approved management program but which are not so found by the Federal or State reviewing agency, and (b) believed to have been incorrectly determined to be inconsistent with an approved management program. This subpart also provides for the reporting of any Federal actions found by the Assistant Administrator to be inconsistent with an approved management program and for the performance review of State implementation of the Federal consistency provisions of this part.

(*Comment.* Statutory citation: section 312: "The Secretary shall conduct a continuing review of * * * the performance of * * * states with respect to coastal zone management * * *." The performance review responsibility under section 312 of the Act has been delegated by the Secretary to the Assistant Administrator for Coastal Zone Management.

Subsection 316(a)(5): "The Secretary shall prepare and submit to the President for transmittal to the Congress * * * a listing of all activities and projects which, pursuant to the provisions of subsection (c) or subsection (d) of section 307, are not consistent with an applicable approved state management program * * *." The reporting responsibility under section 316 of the Act also has been delegated by the Secretary to the Assistant Administrator for Coastal Zone Management.)

§ 930.141 Notification of Federal actions believed to be inconsistent with approved management programs.

(a) Interested parties are invited to submit to the Assistant Administrator detailed comments related to the alleged inconsistency of Federal activities including development projects, Federal license or permit activities, including those described in detail in OCS plans, and Federal assistance activities which are subject to the requirements of this part, and which have not been found by a Federal agency or State agency to be inconsistent with an approved management program. Copies of such comments should be sent to relevant Federal and State agencies, and to the applicant, person or applicant agency as appropriate.

(b) Comments need not conform to any particular form, but should be specific, substantive and factual, and must describe how the Federal action is or would be inconsistent with an approved management program.

(c) Commentators are encouraged to recommend modifications or alternatives to the existing or proposed action which would enable it to be consistent with the management program.

(d) The Assistant Administrator shall assure that public information within such comments is made available for public inspection.

§ 930.142 Notification of Federal actions believed to have been incorrectly determined to be inconsistent with an approved management program.

(a) Interested parties are invited to submit to the Assistant Administrator detailed comments related to Federal license and permit activities, including those described in detail in OCS plans, and Federal assistance activities which are believed to have been incorrectly determined by a State agency to be inconsistent with an approved management program. Copies of such comments should be sent to the relevant Federal and State agencies, and to the applicant, person, or applicant agency as appropriate.

(b) Comments need not conform to any particular form, but should be specific, substantive, and factual, and must clearly describe the basis for the belief that the State agency has incorrectly objected to the Federal action on the grounds of its inconsistency with the management program.

(c) The Assistant Administrator shall assure that public information within such comments is made available for public inspection.

§ 930.143 Assistant Administrator reporting.

After considering the views of interested parties, the relevant Federal agency, State agency, and the applicant, person, or applicant agency, as appropriate, the Assistant Administrator shall determine whether the Federal action will be included in the annual report listing of inconsistent Federal actions.

§ 930.144 Assistant Administrator advisory statements.

Upon request, the Assistant Administrator may issue an advisory statement prior to the issuance of the annual report indicating whether a

Federal action will be listed within the annual report as being inconsistent with an approved management program.

§ 930.145 Review of the implementation of Federal consistency provisions.

As part of the responsibility to conduct a continuing review of approved management programs, the Assistant Administrator shall review the performance of each State's implementation of the Federal consistency provisions in this part. The Assistant Administrator shall use information received pursuant to this subpart to evaluate instances where a State agency is believed to have either failed to object to inconsistent Federal actions, or improperly objected to consistent Federal actions. This evaluation shall be incorporated within the Assistant Administrator's general efforts to ascertain instances where a State has not adhered to its approved management program and such lack of adherence is not justified.

(*Comment.* See 15 CFR 923.83 which describes defects in management program administration which may lead to termination and withdrawal of Federal funding and cessation of the operation of the Federal consistency provisions.)

[FR Doc. 79-19628 Filed 6-22-79; 8:45 am]

BILLING CODE 3510-08-M

TAB F
ENDANGERED SPECIES

federal register

WEDNESDAY, JANUARY 4, 1978

PART IV

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

■

ENDANGERED SPECIES ACT OF 1973

Interagency Cooperation Regulations

[4310-55]

[3510-12]

Title 50—Wildlife and Fisheries

CHAPTER IV—JOINT REGULATIONS (UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR AND NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE)

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973

Interagency Cooperation

AGENCY: United States Fish and Wildlife Service, Department of the Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking establishes the procedural regulations governing interagency consultation under section 7 of the Endangered Species Act of 1973. Section 7 requires Federal agencies to consult with the United States Fish and Wildlife Service and the National Marine Fisheries Service in order to insure that actions that they authorize, fund, or carry out do not jeopardize the continued existence of an endangered or threatened species or result in the adverse modification or destruction of their critical habitat.

EFFECTIVE DATE: January 4, 1978.

FOR FURTHER INFORMATION CONTACT:

Robert Jacobsen, Chief, Branch of Management Operations, Office of Endangered Species, United States Fish and Wildlife Service, Suite 1100, 1612 K Street, NW., Washington, D.C. 20240, 202-343-5687); or Robert Gorrell, Acting Endangered Species Program Manager, Division of Marine Mammals and Endangered Species, National Marine Fisheries Service, Room 406-A, Page Building No. 2, 3300 Whitehaven St. NW., Washington, D.C. 20235, 202-634-7471.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior, and the Director of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, jointly issue a final rulemaking that establishes rules and procedures for interagency consultation pursuant to section 7 of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (hereinafter cited as the Act). The final regulations established by the U.S. Fish and Wildlife Service (hereinafter cited as FWS) and the National Marine Fisheries Service (hereinafter cited as NMFS) will be located in Part 402 of Chapter IV of Title 50, Code of Federal Regulations. This final rulemaking had originally been jointly proposed as separate but substantially identical rulemaking by the FWS and NMFS and would have been located in Parts 17 and 223 of Title 50, respectively. However, in order to simplify the consultation process and avoid the publication of duplicate sets of regulations, the FWS and NMFS are jointly publishing these final section 7 regulations in an entirely new Part 402 in Chapter IV of Title 50. Chapter IV of Title 50 already contains a joint set of FWS/NMFS regulations at Part 401 dealing with anadromous fish. This Chapter of Title 50 will now contain all future sets of joint regulations issued by the two Services and the heading for the Chapter has been changed accordingly. For the convenience of the reader, the original section numbers for the FWS's proposed rulemaking will be enclosed in parenthess after any citation of a new section number in Part 402.

Recognizing that all Federal agencies must cooperate to conserve and protect endangered and threatened species (hereinafter cited as listed species) and their habitat, section 7 of the Act states:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

By internal memorandum of October 16, 1974, the Secretary of the Interior further defined Interior's responsibilities under § 7 and designated the FWS as the lead agency for the Act within the Department of Interior.

In a joint letter to all Federal agencies on December 3, 1974, the Secretaries of Interior and Commerce pointed out the responsibilities of the agencies under section 7 and asked for their cooperation in implementing the Act. The letter of December 3 also clarified the responsibilities of the FWS and the NMFS as the lead agencies of the two Departments for the implementation of the Act.

On April 22, 1975, the Directors of the FWS and NMFS published a joint notice in the FEDERAL REGISTER (40 FR 17764–17765) describing how "critical habitat" would be determined for listed species pursuant to section 7 of the Act.

On May 29, 1975, the FWS and NMFS convened a conference for Federal agencies to discuss the Act and its implications for the activities and programs of the agencies. At this meeting, the Federal agencies requested that guidelines be developed to assist them in meeting their responsibilities under section 7.

In response to that request, the FWS and NMFS convened an Ad-Hoc Interagency Committee of representatives from 11 Federal agencies to advise the two Services in developing the necessary guidelines.

On April 22, 1976, "Guidelines to Assist the Federal Agencies in Complying with Section 7 of the Endangered Species Act of 1973" were transmitted to all Federal agencies by the FWS and NMFS. These guidelines were an interim measure designed to furnish a broad and flexible framework within which Federal agencies could prepare internal procedures to fulfill their responsibilities under section 7. However, as stated in the guidelines, they were "a starting point for the development and promulgation of regulations" and as such, are now superseded by this final rulemaking.

At the request of the Office of Management and Budget (hereinafter OMB), copies of the guidelines were again transmitted to the Federal agencies on May 20, 1976, for a "Quality of Life" review. The Federal agencies were requested to submit comments on the guidelines by August 1, 1976. As of September 28, 1976, 40 comments had been received from Federal agencies. Although 8 comments expressed unequivocal support for the guidelines and 3 comments were opposed, the remaining 29 did not express general support or opposition, limiting themselves to comments on particular language, organization or approach. Seven of the 29 simply stated that they had no comment at that time.

The guidelines were subsequently revised by the FWS and NMFS for publication as a proposed rulemaking, incorporating many of the comments of the Federal agencies. At the request of OMB, the draft version of the proposed rulemaking was sent to the Federal agencies on November 11, 1976, for a second "Quality of Life" review, with comments due no later than December 1, 1976. As of January 5, 1977, 4 Federal agencies had commented. The draft proposed rulemaking was revised somewhat and then published in the FEDERAL REGISTER as proposed regulations on January 26, 1977 (42 FR 4868) (42 FR 4873). Interested parties were given until March 28, 1977, to comment.

At the request of OMB, the FWS met on May 15, 1977, with a number of representatives from various Federal Agencies to respond to question and objections concerning the proposed regulations. As a result of this meeting, OMB requested that the FWS consider modifications to the regulations concerning the use of counterpart regulations, aggregate consultation, the designation of "lead" agencies, and the role of outside parties in consultation. Upon consideration of the comments received on the proposed rulemaking and at the May 15, 1977, meeting at OMB, the FWS and NMFS have revised their proposed regulations as set forth in the following final rulemaking.

These regulations have been subjected to more critical review by other Federal agencies than any other set of regulations issued by the FWS and the NMFS, and it is the position of those two Services that the vast majority of Federal agency comments have been incorporated into this final rulemaking.

Summary of Comments Received on Proposed Rulemaking

A total of 65 comments were received on the proposed rulemaking of January 26, 1977. Twenty-three of the comments expressed unequivocal support for the proposal or offered no substantive comments at that time. Seven of the comments expressed opposition to the proposal while the remaining 35 comments expressed neither general support nor opposition, limiting themselves to comments on particular language, organization or approach. Thirty-one comments were received from Federal agencies or commissions, 9 comments from State or regional organizations, 7 comments from private environmental organizations, and 18 comments from private commercial enterprises.

Perhaps the issue that received the most attention and comment concerned the mandatory, versus discretionary, nature of the proposed regulations. Some Federal agencies and private commercial groups suggested that the use of the consultation process should be discretionary with each agency. The Council on Environmental Quality and a number of private environmental groups took the opposite position and cited two recent United States Court of Appeals decisions as the basis for their conclusions.

The case of *National Wildlife Federation v. Coleman*, 529 F. 2d 359 (5th Cir. 1976) concerned the adverse impacts upon Mississippi sandhill cranes, an endangered species, which would have resulted from completion of a portion of Interstate Highway 10 in Mississippi. In enjoining completion of the project until protective modifications were made, the Court stated, "The primary responsibility for implementing section 7 is on the Secretary of the Interior. Federal agencies are required to consult and obtain the assistance of the Secretary before taking any actions which may affect endangered species or critical habitat. However, once an agency has had meaningful consultation with the Secretary of Interior concerning actions which may affect an endangered species, the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of Interior a veto over the actions of other federal agencies, provided that the required consultation has occurred." Id. at 371.

Furthermore, one week after the publication of the January 26th proposed rulemaking, the Sixth Circuit Court of Appeals expressly affirmed the mandatory nature of consultation under section 7 in the case of *Hill v. TVA*, 549 F. 2 1064 (6th Cir. 1977). In enjoining the closure of Tellico Dam because of the expected destruction of the critical habitat of the snail darter, an endangered fish, the Court stated, "The Secretary [of Interior] is not empowered to veto the final actions of such agencies, even when he is convinced, *after the requisite consultation has ensued*, that they violate the Act." *Id* at 1070 [emphasis added].

The FWS and the NMFS consider these legal interpretations binding and persuasive and have substituted the word "shall" for the word "should" in the final rulemaking. Section 7's mandatory directive is quite clear in requiring the initiation of consultation upon a determination that an activity or program may affect a listed species or its critical habitat. Since consultation is mandatory in those situations, the FWS and NMFS contend that they cannot adequately fulfill their responsibilities under section 7 unless there is established a rational and uniform procedure for coordinating the consultation process. Anything short of a uniform, general approach would be unnecessarily inefficient and would ultimately work to the disadvantage of the listed species and perhaps to the Federal agencies as well.

The FWS and NMFS recognized this problem in the preamble to the January 26th proposed rulemaking: "The proposal establishes a fixed procedure of consultation because the FWS and NMFS believe they cannot responsibly fulfill their obligations under section 7 unless there is a rational and uniform procedure for the provision of biological advice to agencies considering actions within the borders of section 7." (42 FR 4868, 4869).

The FWS and NMFS are authorized under the Act to issue such regulations as they deem appropriate for the conservation of listed species. The two Services believe that these procedural regulations promote the conservation of listed species by implementing a uniform general framework as the starting point for consultation. Once the mandatory consultation has taken place, however, the ultimate responsibility for determining agency action in light of section 7 still rests with the particular Federal agency that was engaged in consultation. In this fashion, a standardized consultation process is established which preserves ultimate agency administrative control over its activities or programs.

The FWS and NMFS recognize, nonetheless, that general consultation procedures under section 7 must be sufficiently flexible to accommodate the myriad of activities that are authorized, funded, or carried out by the Federal Government. For example, the statutory responsibilities and needs of an HEW grant-in-aid program are considerably different than those of a construction agency such as the Bureau of Reclamation. The need for counterpart regulations to deal with this problem was commented upon by numerous organizations, agencies, the Council on Environmental Quality and OMB.

In response to these suggestions, the FWS and NMFS have added a new section at § 402.04(l) which authorizes the drafting of joint counterpart regulations by Federal agencies and the FWS and NMFS. These counterpart regulations would allow individual Federal agencies to "fine tune" the general consultation framework to reflect their particular program responsibilities and obligations.

Such counterpart regulations would have to be first published as proposed and final rulemakings with at least a 60-day period for public comment. The joint participation and approval of the FWS and NMFS would also be required on those rulemakings in order to guarantee that the efficiency of consultation and the overall degree of protection afforded listed species is not diminished as a result of an agency's counterpart regulations. Changes in the general consultation framework established by this final rulemaking must, therefore, be designed to enhance the efficiency of the consultation process, without decreasing the availability of biological information or eliminating ultimate Federal agency responsibility for compliance with section 7. As long as the general consultation framework is used as a starting point, Federal agencies can anticipate little difficulty in securing approval of the FWS and NMFS for counterpart regulations. Finalized counterpart regulations for a particular agency would supersede the regulations established by this final rulemaking.

A third modification suggested by a number of Federal agencies, a private conservation organization, and OMB concerned the need to authorize consultation on a broader scale than for each separate agency activity. Similar or identical activities that are being implemented within a given administrative unit, or in accordance with a comprehensive plan, can be expected to have similar effects upon listed species or their habitats. Thus the timber cutting practices adopted by the U.S. Forest Service as part of a conservation program for the red cockaded woodpecker could be the same from timber lease to timber lease within a given National Forest. Consultation on every single timber lease in such a situation would be repetitive and inefficient.

The FWS and NMFS have, therefore, added a new provision in § 402.04(a)(3) (§ 17.93(a)(3)) which expressly acknowledges the possibility of "aggragate" consultation. The concurrence of the FWS or NMFS on the scope of "aggregate" consultation would be required, however, in order to guarantee that it does not render biological analysis inaccurate or impossible.

A fourth common objection to the proposed rulemaking concerned the procedure for designating "lead" agencies under § 402.04(b)(2) (§ 17.93(b)(2)). When an activity or program involves more than one Federal agency, the designation of a "lead" agency for consultation may prove to be advantageous. The proposed wording of § 402.04(b)(2) (§ 17.93(b)(2)) required the concurrence of the Director of the FWS or NMFS, as appropriate, for any such designations. It was pointed out that this was more restrictive than is required for the designation of a "lead" agency under the National Environmental Policy Act (hereinafter NEPA). Accordingly, the FWS and NMFS have deleted the concurrence requirement from § 402.04(b)(2) (§ 17.93(b)(2)). As an alternative, additional language has been added to § 402.04(b)(2) (§ 17.93(b)(2)) which sets out the factors that agencies should consider in designating a lead agency for section 7 consultation.

A number of other comments were received concerning the need to include maps or geographical coordinates in rulemakings designating critical habitat. The two Services acknowledge the benefit to agency planning which would result from the incorporation of this suggestion and § 402.05(a) (§ 17.94(a)) has been modified accordingly.

A sixth area of common concern dealt with the retroactive application of section 7 to activities or programs that were substantially completed at the time of the listing of a species or the determination of its critical habitat. As proposed, § 402.03 (§ 17.92) stated that section 7 applied to all activities or programs wherein Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat. In discussing the application of § 402.03 (§ 17.92), the FWS and NMFS stated in the preamble for the proposed regulation that "Neither FWS nor NMFS intends that section 7 bring about the waste that can occur if an advanced project is halted. * * * The affected agency must decide whether the degree of completion and extent of public funding of particular projects justify an action that may be otherwise inconsistent with section 7." (42 FR 4868, 4869.)

This discussion in the preamble was based on an analysis of the case law on retroactivity under NEPA. It was originally believed that retroactive situations under NEPA and the Act were analogous enough to warrant the incorporation of the NEPA case law into the section 7 regulations.

The Sixth Circuit Court of Appeals in the recent case of *Hill* v. *TVA*, 549 F. 2d 1064, supra, specifically considered this analogy and rejected it. The Court concluded that the extinction of a species was too severe a cnsequence to warrant exempting a substantially completed activity solely on the basis of dollars already spent. The Court noted that as long as some Federal discretionary control or involvement remained that could avoid jeopardizing the listed species or adversely modifying or destroying its critical habitat, the degree of completion of a project was irrelevant. In light of the Sixth Circuit Court of Appeal's analysis, therefore, the FWS and NMFS now reject the analysis of retroactivity in the proposed rulemaking's preamble and adopt the rationale of the Sixth Circuit.

Seven comments were received from Federal, State and private entities which sought to expand the participation of outside parties in the consultation process. In particular, EPA suggested that the regulations authorize the delegation of consultation responsibilities to the States, project grantees and permit applicants. In addition, the Department of HUD and the Federal Highway Administration both recommended that grant recipients be allowed to consult in place of the responsible Federal agency.

The FWS and NMFS acknowledge that outside parties directly connected with an activity or program should be accorded a greater role during the consultation process itself. This could be especially helpful for grant-in-aid programs of the Federal Government. Nonetheless, the clear language of section 7 cannot be ignored. Section 7 sets out the endangered species responsibilities for Federal departments and agencies, not for private citizens or State agencies. Thus it is the position of the FWS and NMFS that the ultimate responsibility for section 7 compliance remains with each Federal agency and cannot be delegated by it.

The FWS and NMFS believe that a compromise solution exists for this problem. Section 402.04(d) (§ 17.93(d)) has been reworded to indicate that non-Federal representatives may be authorized by a Federal agency in approved counterpart regulations to participate in the consultation process. Although the request for consultation must come from the responsible Federal agency, the actual consultation itself could take place with a State or private grantee or permit applicant. The final biological opinion of the FWS or NMFS would be sent to the responsible Federal agency, which then must decide in light of section 7 whether to authorize or fund the activity or program under review. The use of counterpart regulations could thus provide additional flexibility for Federal agencies, while leaving ultimate responsibility for section 7 compliance intact.

In a related series of comments, three private environmental organizations suggested that requests for consultation and final biological opinions be published in the FEDERAL REGISTER. In addition, it was suggested that the public be provided with a 60-day opportunity for comment on activities or programs that were in need of further consultation after a threshold examination. The FWS and NMFS believe that it would be administratively too burdensome to publish consultation requests and final biological opinions in the FEDERAL REGISTER, since it is estimated that requests for consultation could run from between 10,000 to 20,000 per year. The biological opinions rendered as a result of consultation, however, will be made available to the public upon request.

The FWS and NMFS also feel compelled to reject the suggested opportunity for public comment for two reasons. First, the time frame for consultation is long enough as it is without additional delays in the process. Federal agencies will be reluctant to initiate consultation unless they can be assured of receiving a prompt and efficient reply.

Secondly, the success of the entire consultation process may depend in large part upon the ability of the parties engaged in consultation to avoid antagonistic positions and unnecessary defensiveness. Consultation discussions should be limited to the expected biological impacts of an activity or program upon a listed species or its critical habitat. Political considerations or the popularity of a particular proposal are irrelevant. Federal agencies may avoid the consultation process if they are given the impression that they are going to be subjected to protracted political battles under the guise of public comment and participation.

This is not to say that individual Federal agencies in their counterpart regulations could not voluntarily include a provision for public comment on their request for consultation. Rather, it merely reflects the belief of the FWS and NMFS that the consultation process would be best served if active participation were limited to those parties with a direct involvement in the proposed activity or program.

A ninth subject for comment concerned the inclusion of nonbiological factors into the critical habitat determination criteria. Two Federal agencies and a private commercial enterprise suggested that socioeconomic or cultural factors unrelated to the biological needs of a listed species be included within the criteria set forth in § 402.05 (§ 17.94). The FWS and NMFS strongly oppose this suggestion. Critical habitat is just that—habitat which is critical to the survival and recovery of the species. The focus is entirely on the biological and ecological needs of the listed species. The consideration of various socioeconomic factors is irrelevant in determining what those biological needs are. The inclusion of socioeconomic considerations would diminish the effectiveness of conservation programs for the recovery of a listed species by distorting the estimate of its true habitat needs. Therefore, the criteria in § 402.05 (§ 17.94) are limited to biological factors alone.

A tenth suggested modification concerned an agency's commitment of resources for an activity or program while consultation was in progress. Two private environmental groups suggested that a provision be included prohibiting the irretrievable or irreversible commitment of resources during consultation which would foreclose the consideration of alternatives or modifications to the identified activity or program.

The FWS and NMFS recognize the merit in this suggestion and have adopted appropriate language into § 402.04(a)(3) (§ 17.93(a)(3)). It is the position of the FWS and NMFS that Congress intended Federal agencies to consult in good faith under section 7. The ultimate goal of consultation is to identify conflicts with listed species and their habitats as early as possible in the planning process. This enables the responsible Federal agency to make any necessary modifications in the proposed activity or program which would eliminate the adverse effects upon a particular species.

The consultation process becomes a sham, however, if an agency can make irreversible commitments of resources during consultation which foreclose the adoption of the very alternatives being discussed. Such a commitment could easily lead to the waste of millions of dollars if the activity or program is subsequently enjoined for noncompliance with section 7. This is especially true in light of the ruling in *Hill* v. *TVA*, 549 F.2d 1064, supra, that even substantially completed projects are not immune from the requirements of section 7. The adopted language in § 402.04(a)(3) (§ 17.93(a)(3)) is designed to prevent this needless waste. The two Services are confident that Federal agencies will recognize that this adopted language is a logical extension of the obligation to consult in good faith.

An eleventh area of conecrn dealt with the 60-day time frames proposed for the consultation process. Under the proposal, a 60-day limit was established for threshold examinations. Furthermore, an additional 60-day limit was set for further consultation, pending receipt of adequate biological information. Suggested changes in these time frames ranged from 30 to 45 days.

While recognizing the need for expediting the consultation process, the FWS and NMFS nonetheless believe that these proposed modifications would provide an inadequate opportunitiy for reviewing the potential impacts of an activity or program. In light of the expected volume of consultation requests, the complexity of the biological issues involved and the frequent lack of available information, as a general rule a 60-day limit appears to be the shortest time frame possible. It is anticipated that many requests for consultation will be processed before the expiration of 60 days. Nonetheless, the FWS and NMFS contend that a potential maximum of 60 days must be reserved for biological analysis.

Five Federal agencies and private commercial enterprises suggested that the proposed definitions contained in § 402.02 (§ 17.03) be expanded and made more specific. The FWS and NMFS disagree as to the need for, or the wisdom of, further delineation of those definitions. Definitions concerning jeopardy and the adverse modification or destruction of critical habitat must be flexible enough to deal with every possible consultation situation. In a similar fashion, the definition of critical habitat must be broad enough to cover the habitat needs of an endless variety of species. Overly specific and narrow definitions of these concepts would ultimately operate to the disadvantage of listed species by excluding them from coverage in unique situations. The definitions presently contain adequate criteria and guidelines to be utilized by the FWS and NMFS and provide a rational basis for the two Services to implement section 7.

A thirteenth area of concern dealt with the failure of the proposed rulemaking to set forth the procedure for modifying or withdrawing existing critical habitat determinations. Two Federal agencies and a private commercial enterprise requested that this process be made more explicit. The FWS and NMFS had assumed that it was clear that alterations of critical habitat determinations would be governed by the regulation provisions in section 4 of the Act. In order to eliminate any confusion on this point, § 402.05 (§ 17.94) has been reworded to indicate that modifications or withdrawals of critical habitat will require proposed and final rulemaking with an opportunity for public comment.

A final subject for comment concerned the relationship between the Act and NEPA. Comments on this issue generally fell into two categories. First, it was suggested by some Federal agencies and private commercial enterprises that a separate consultation process under section 7 was unnecessary in light of the EIS review process under NEPA. Secondly, it was suggested that Environmental Impact Statements be prepared for all designations of critical habitat. The FWS and NMFS must reject both suggestions.

To begin with, it has always been the position of the FWS and NMFS that the Act and NEPA share common goals and must be implemented in a harmonious fashion. The two Services have consistently maintained that section 7 consultation should be closely linked to established procedures for interagency review of EIS's in order to avoid unnecessary paper work. Furthermore, the proposed regulations stated that where consultation has been coordinated with interagency cooperation required by other statutes such as NEPA or the Fish and Wildlife Coordination Act, the biological opinions resulting from section 7 consultation should be included within the documents required by those statutes. This approach has been specifically designed to integrate consultation into NEPA.

This does not mean, however, that procedural compliance with NEPA adequately satisfies an agency's consultation responsibilities under section 7. To begin with, there is no guarantee that every proposed activity or program that may affect a listed species will generate an Environmental Impact Statement. For probably the majority of Federal agency activities, Environmental Impact Assessments, and not Impact Statements, are prepared. Assessments are rarely circulated for interagency comment. This is clearly a situation where procedural compliance with NEPA fails to satisfy the consultation requirements under section 7.

Additional problems exist as well. It has already been noted that 60-day time frames are generally required for an adequate biological review under section 7. Yet agencies are required to circulate draft Environmental Impact Statements for only 45 days. Furthermore, the fact that a draft EIS has been sent to the FWS or NMFS does not guarantee that it will be reviewed within that agency by people with endangered species expertise. Within the Department of Interior, draft EIS's received from the Department's office of Environmental Project Review are routed through the FWS's branch of Environmental Coordination and not the Office of Endangered Species. The latter Office is only brought into the draft EIS review process if someone else has spotted in the EIS a potential conflict with listed species or their habitat. By that time, a good part of the 45-day comment period has usually expired. The intensity of review would thus be diminished and become more haphazard without an independent consultation process under these regulations.

Finally, consultation is only going to be effective if undertaken as early as possible in an agency's planning process. Large amounts of money and manpower are invested in draft Environmental Impact Statements. By the time a draft EIS is circulated for comment, the proposed activity or program has usually generated a considerable degree of momentum within an agency. So much momentum is generated, in fact, that an agency might resist modifying or abandoning the activity, in spite of a conflict with section 7. The optimal time for consultation, therefore, is prior to completion of a draft EIS. That is the point in the planning process where the flexibility is the greatest and the commitment of resources the least. For the foregoing reasons, the FWS and NMFS contend that consultation cannot adequately take place through the NEPA interagency review process alone.

The two Services must also reject the second suggestion that EIS's be prepared for every single critical habitat determination. Critical habitat proposals must be reviewed on a case by case basis. An Environmental Impact Assessment will first be prepared for each proposal. Based upon a review of that Assessment and comments received on the proposal, it will subsequently be decided whether an EIS is required prior to final rulemaking. The automatic preparation of impact statements under these circumstances, therefore, must be rejected as being unwarranted, inflexible and not required by NEPA.

DESCRIPTION OF FINAL RULEMAKING

The purpose of this rulemaking is to establish joint rules and procedures for interagency cooperation pursuant to section 7 of the Act. This joint rulemaking is summarized below, with citation to the original section numbers contained in the FWS proposed rulemaking in parentheses:

Section 402.01 (§ 17.3) is established by defining the following terms which are used in section 7 and in this rulemaking: "Activities and programs," "Critical habitat," "Destruction or adverse modification," "Director or Regional Director," "Federal agency," "Jeopardize the continued existence of," "Listed species," and "Recovery."

Section 402.02 (§ 17.91) sets out the scope of section 7 under the Act. This section discusses the responsibilities of the Federal agencies under section 7 to carry out conservation programs for listed species, and to insure that their activities and programs do not jeopardize the continued existence of listed species or result in the destruction or modification of critical habitat. The section affirms that the prohibition against causing "jeopardy" applies extraterritorially.

Section 402.03 (§ 17.92) describes the application of section 7 to previously initiated Federal agency actions.

Section 402.04 (§ 17.93) sets forth the procedures that Federal agencies shall follow in meeting the consultation and assistance requirements of section 7:

(a) *Initiation.* (1) The consultation process shall be initiated by Federal agencies after review and identification of activities or programs that may affect listed species.

(2) If the review indicates no effect on listed species or their habitat, consultation is not required unless requested by the FWS or NMFS.

(3) If a Federal agency identifies any activity or program that may affect listed species or their habitat, that agency shall initiate consultation by sending a written request to the appropriate FWS or NMFS official. If foreign countries or the high seas are involved, a copy of the request and all subsequent correspondence shall be sent to the Secretary of State as well. The request may with the approval of the appropriate FWS or NMFS official, encompass a number of similar, related activities.

(4) Consultation may also be requested by either the FWS or NMFS if they should become aware of a Federal activity or program that may affect listed species and has not received the benefit of section 7 consultation.

(5) Informal consultation at the field level may be initiated, but is not a substitute for formal consultation. Federal agencies may obtain assistance from any source so long as they retain ultimate responsibility for consultation.

.(b) *Forms of consultation.* (1) Consultation may be coordinated with interagency review under the National Environmental Policy Act (42 U.S.C. 4321 et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), and other appropriate statutes. However, such coordination does not relieve the Federal agencies from compliance with the consultation procedures contained in this rulemaking.

(2) When several Federal agencies are involved in a common activity or program, they may, after notifying the FWS or NMFS, choose a lead agency to carry out consultation.

(c) *Assistance from the Service.* It is the responsibility of the affected Federal agencies to obtain the biological data necessary to evaluate the effect of an activity or program. The FWS or NMFS will assist with available data when requested, but are not obligated to fund the basic studies.

(d) *Assistance from other sources.* A Federal agency may seek biological information from any source and may authorize non-Federal representatives to participate in consultation pursuant to approved counterpart regulations; however, the agency remains ultimately responsible for compliance with the procedures of this section.

(e) *Threshold examination.* Upon receipt of a written request for consultation from a Federal agency, the FWS or NMFS will conduct a threshold examination. A threshold examination is a preliminary assessment to ascertain if an activity or program will adversely affect listed species or their habitat.

(1) If, in the Director's or Regional Director's opinion, the Federal activity or program will promote the conservation of listed species or their habitat, the Federal agency will be notified within 60 days of initiation, and further consultation will not be required.

(2) If an activity or program is not specifically for the conservation of listed species and the threshold examination reveals that it is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat, the Federal agency shall be notified within 60 days after initiation and further consultation will not be required.

(3) If an activity or program is not specifically for the conservation of listed species and the threshold examination reveals that it is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, the Federal agency shall be notified within 60 days after initiation and further consultation will not be required.

(4) All biological opinions issued after a threshold examination shall be accompanied by the facts and documentation on which they are based, and may include recommendations for modifications to the activity or program.

(f) *Further consultation.* If the threshold examination reveals that there is insufficient information to conclude that the activity or program is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, the Federal agency will be notified within 60 days of initiation. The Federal agency then has the responsibility to gather sufficient information. The Service will issue a biological opinion and end consultation within 60 days of receipt of adequate information.

(g) *Responsibilities after consultation.* Upon receipt of the biological opinion from the FWS or NMFS, it will be the responsibility of the Federal agency to determine whether and how to proceed, in light of its section 7 obligations.

(h) *Reinitiation.* Consultation shall be reinitiated: (1) If new information reveals impacts that may hinder the survival or recovery of listed species;

(2) If the activity or programs is modified in a fashion not contemplated by the consultation process;

(3) If a new species is listed that may be affected by the activity or program;

(i) *Counterpart regulations.* The procedures in Section 402.04 (§ 17.93) may be superseded by counterpart regulations jointly drafted by individual Federal agencies and the FWS and NMFS.

Section 402.05 (§ 17.94) sets forth the procedures for determining critical habitat, states the criteria for making such determinations, and provides for emergency determinations.

Accordingly, Chapter IV of Title 50, Code of Federal Regulations, is amended as set forth below: 1. Amend the heading of Chapter IV by deleting the present language and substituting instead the following: "Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce).

2. Add an Index for new Part 402 to read as follows:

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973

Sec.
402.01 Scope.
402.02 Definitions.
402.03 Applicability to previously initiated actions.
402.04 Consultation.
402.05 Determination of critical habitat.

AUTHORITY: Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)

3. Add §§ 402.01 through 402.05 of Part 402, Chapter IV, to read as follows:

§ 402.01 Scope.

This Part interprets and implements section 7 of the Endangered Species Act of 1973 (hereinafter the Act). Section 7 (16 U.S.C. 1536) applies to all listed species of fish, wildlife, or plants and imposes three burdens upon the Federal agencies. First, it directs them to utilize their authorities to carry out conservation programs for listed species. Such affirmative conservation programs must comply with any applicable permit requirements of 50 CFR Parts 17, 220, 222 and 227 for listed species and should be fully coordinated with the appropriate Director. Second, it requires every Federal agency to insure that its activities or programs in the United States, upon the high seas, and in foreign countries will not jeopardize the continued existence of a listed species. And third, section 7 directs all Federal agencies to insure that their activities or programs do not result in the destruction or adverse modification of critical habitat. The United States Fish and Wildlife Service and the National Marine Fisheries Service share responsibilities for the Act. A Federal agency can determine which Service to initiate consultation with by scanning the list of species under the jurisdiction of the National Marine Fisheries Service located at 50 CFR 222.23(a) and 227.4. If the Federal agency's activity or program may affect a listed species which is cited in 50 CFR 222.23(a) or 227.4, then the agency shall initiate consultation with the National Marine Fisheries Service. If the listed species is not cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall initiate consultation with the Fish and Wildlife Service.

§ 402.02 Definitions.

"Activities or programs" means all actions of any kind authorized, funded, or carried out by Federal agencies, in whole or in part, examples of which include, but are not limited to: (1) actions intended to conserve listed species or their habitat; (2) the promulgation of regulations; (3) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (4) actions directly or indirectly causing modifications to the land, water, or air.

"Critical habitat" means any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

"Destruction or adverse modification" means a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. Such alterations include, but are not limited to those diminishing the requirements for survival and recovery listed in § 402.05(b). There may be many types of activities or programs which could be carried out in critical habitat without causing such diminution.

"Director or Regional Director" means the Director or one of the Regional Directors of the United States Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, for purposes of consultation.

"Federal agency" means each authority of the Government of the United States except for the Congress, the Courts of the United States, the Governments of the Territories, Commonwealths, or possessions of the United States, or the Government of the District of Columbia.

"Jeopardize the continued existence of" means to engage in an activity or program which reasonably would be expected to reduce the reproduction, numbers, or distribution of a listed species to such an extent as to appreciably reduce the likelihood of the survival and recovery of that species in the wild. The level of reduction necessary to constitute "jeopardy" would be expected to vary among listed species.

"Listed species" means any species of fish, wildlife, or plant which is designated as endangered or threatened under the Act.

"Recovery" means improvement in the status of listed species to the point at which listing is no longer required.

§ 402.03 Applicability to previously initiated actions.

Section 7 applies to all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat.

§402.04 Consultation.

(a) *Initiation*. (1) It is the responsibility of each Federal agency to review its activities or programs and to identify any such activity or program that may affect listed species or their habitat. Reviewing Federal agencies may obtain advice from the Service, but this is supplemental to, and not a substitute for, the formal consultation process set forth in this Part. Where a Federal agency funds or authorizes an activity or program to be carried out by a non-Federal entity, the Federal agency shall initiate the formal consultation process and not the non-Federal entity.

(2) If a Federal agency decides that its activities or programs will not affect listed species or their habitat, consultation shall not be initiated unless requested by the Service.

(3) When a Federal agency identifies activities or programs that may affect listed species or their habitat, the agency shall convey a written request for consultation with available information to: the Regional Director for the Region where the activity or program is or will be carried out; or to the Director or Regional Director for the Region where the Federal agency is headquartered, if more than one Region is involved; or to the Director if foreign countries or the high seas are involved. In addition, if foreign countries or the high seas are involved, a copy of the request for consultation and all subsequent correspondence shall be forwarded to the Secretary of State c/o the Director, Office of Environmental Affairs. Any request for consultation may encompass, subject to the approval of the Director or Regional Director, a number of similar individual activities within a given geographical area, administrative unit, or segment of a comprehensive plan. Until consultation has been completed and a biological opinion issued, good faith consultation shall preclude a Federal agency from making an irreversible or irretrievable commitment of resources which would foreclose the consideration of modifications or alternatives to the identified activity or program.

(4) In addition, the Director or Regional Director will request initiation of consultation if he identifies any activity or program of a Federal agency that has not received prior consultation and that may affect listed species or their habitat.

(5) Informal consultation may be initiated at the field level between the Service and the Federal agencies or their authorized representatives. Such informal consultation is supplemental to, and not a substitute for, the formal consultation process set forth in this part.

(b) *Form*. (1) Consultation under section 7 may be consolidated with interagency cooperation required by other statutes, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) or the National Environmental Policy Act (42 U.S.C. 4321 et seq.). The satisfaction of the requirements of these other statutes, however, does not in itself relieve a Federal agency of its obligation to comply with the consultation procedures set forth in this part.

(2) When particular programs or activities involve more than one Federal agency, these agencies may, upon notification of the Director or Regional Director, fulfill their consultation responsibilities through a single lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies become involved, the magnitude of their respective involvement and their relative expertise with respect to the environmental effects of the activity or program.

(c) *Assistance from the Service*. It is the primary responsibility of each Federal agency requesting consultation to conduct the appropriate studies and to provide the biological information necessary for an adequate review of the effect an identified activity or program has upon listed species or their habitat. To the extent it is available, the Service will upon request provide all relevant data and reports, personnel, and recommendations for additional studies or surveys, but the Service is not obligated to fund any such additional studies or surveys.

(d) *Assistance from other sources*. Federal agencies may seek assistance from any source to obtain the biological information necessary for a review of the effect an activity or program has upon listed species or their habitat. Such assistance may include, but is not limited to, that obtained by contract or required by regulations of the Federal agency. Although it may authorize a non-Federal representative to participate in the consultation process pursuant to approved counterpart regulations, the ultimate responsibility for compliance with the procedures of this section remains with the Federal agency and cannot be delegated by it.

(e) *Threshold examination*. Upon receipt of a written request for consultation, the Director or Regional Director will conduct a threshold examination of the identified activity or program. A threshold examination will include a review of available information and may include an on-site inspection of the area.

(1) If, in the opinion of the Director, an identified activity or program will promote the conservation of listed species, the appropriate Federal agency shall be notified in writing within 60 days after consultation is initiated, and additional section 7 consultation shall be unnecessary. The Service, to the extent feasible, will assist in carrying out such programs if requested by the Federal agency.

(2) If an identified activity or program is not specifically for the conservation of listed species, but the Director or Regional Director concludes from the threshold examination that the activity or program is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat, the appropriate Federal agency shall be notified in writing within 60 days after consultation is initiated and further section 7 consultation shall be unnecessary.

(3) If an identified activity or program is not specifically for the conservation of listed species and the Director or Regional Director concludes from the threshold examination that the activity or program is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat, the appropriate Federal agency shall be notified in writing within 60 days after

consultation is initiated and further section 7 consultation shall be unnecessary.

(4) The biological opinions issued pursuant to subparagraphs (1), (2) and (3) of this subsection shall be accompanied by a statement of the facts and documentation on which they are based and may include recommendations for modifications in the identified activity or program which would enhance the conservation and protection of a listed species or its critical habitat. Such opinions will be released pursuant to the Freedom of Information Act.

(f) *Further consultation.* If the Director or Regional Director determines as a result of the threshold examination that insufficient information exists to conclude that an identified activity or program is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat, the Federal agency will be so notified in writing within 60 days after formal consultation is initiated. The Federal agency, with assistance as feasible from the Service and other sources of expertise, shall then obtain additional information and conduct, as appropriate, biological surveys or studies to determine how the activity or program may affect listed species or their critical habitat. Within 60 days of receipt of adequate information and documentation, unless special circumstances require negotiation of a longer period, the Service will end consultation by issuing a biological opinion pursuant to the provisions of paragraphs (e) (1), (2), (3), and (4) of this section, as appropriate.

(g) *Responsibilities after consultation.* Upon receipt and consideration of the biological opinion and recommendations of the Service, it is the responsibility of the Federal agency to determine whether to proceed with the activity or program as planned in light of its section 7 obligations. Where the consultation process has been consolidated with interagency cooperation required by other statutes such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) or the National Environmental Policy Act (42 U.S.C. 4321 et seq.), the final biological opinion and recommendations of the Service shall be stated in the documents required by those statutes.

(h) *Reinitiation.* Consultation shall be reinitiated by the Service or by the Federal agency if: (1) New information reveals impacts of the identified activity or program that may affect listed species or their habitats;

(2) The identified activity or program is subsequently modified, whether as a result of a biological opinion issued after consultation or not; or

(3) A new species is listed that may be affected by the identified activity or program.

(i) *Counterpart regulations.* The consultation procedures set forth in this section may be superseded for a particular Federal agency by joint counterpart regulations drafted by that agency and the Fish and Wildlife Service and the National Marine Fisheries Service. Such counterpart regulations shall be published in the FEDERAL REGISTER as proposed and final rulemakings and shall provide for a minimum 60-day period for public comment.

§ 402.05 Determination of critical habitat.

(a) *Procedure.* Whenever deemed necessary and appropriate, the Director shall determine critical habitat for a listed species. After exchange of biological information, as appropriate, with the affected States and Federal agencies with jurisdiction over the lands or waters under consideration, the Director shall publish proposed and final rulemakings, accompanied by maps and/or geographical descriptions in the FEDERAL REGISTER. Comments of the scientific community and other interested persons will also be considered in promulgating final rulemakings. The modification or revocation of a critical habitat determination shall also require the publication in the FEDERAL REGISTER of a proposed and final rulemaking with an opportunity for public comment.

(b) *Criteria.* The Director will consider the physiological, behavioral, ecological, and evolutionary requirements for the survival and recovery of listed species in determining what areas or parts of habitat (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of the species) are critical. These requirements include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing of offspring; and generally,

(5) Habitats that are protected from disturbances or are representative of the geographical distribution of listed species.

(c) Emergency determination. Paragraphs (a) and (b) of this section notwithstanding, the Director may make an emergency determination of critical habitat if he finds that an impending action poses a significant risk to the well-being of a listed species by the destruction or adverse modification of its habitat. Emergency determinations will be published in the FEDERAL REGISTER and will remain in effect for no more than 120 days.

This final rulemaking is issued under the authority contained in the Endangered Species Act of 1973 (16 U.S.C. § 1531 et seq.) and the primary author is Donald Barry, Attorney Advisor, Solicitor's Office, Department of the Interior, 202-343-2174.

NOTE.—The United States Fish and Wildlife Service and the National Marine Fisheries Service have determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11949 and OMB Circular A-107.

It was previously noted that these regulations have been submitted to over two years of review and comment by Federal agencies. During this drafting period, however, agencies were still held accountable for compliance with their section 7 obligations. The limited consultation that took place often occurred in an ad-hoc and haphazard fashion. Because of the extensive familiarity of the Federal agencies with these regulations and the need to expeditiously initiate the formal consultation process, the FWS and NMFS find that "good cause" exists within the meaning of 5 U.S.C. § 553(d) of the Administrative Procedure Act, thereby warranting that these regulations become effective immediately upon publication.

Dated: October 21, 1977.

LYNN A. GREENWALT,
Director, Fish and Wildlife Service.
JACK GEHRINGER,
Deputy Director,
National Marine Fisheries Service.

[FR Doc.78-6 Filed 1-3-78;8:45 am]

DEPARTMENT OF THE INTERIOR

Office of the Secretary

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 451

Final Rules on Endangered Species Exemption Applications

AGENCIES: Department of the Interior and Department of Commerce, National Oceanic and Atmospheric Administration.

ACTION: Final rules.

SUMMARY: Section 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, directs all Federal agencies to insure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of

critical habitats. These final rules prescribe the procedures by which applicants may apply for exemptions from the requirements of section 7(a)(2). These rules also establish procedures for the initial handling of exemption applications.

EFFECTIVE DATE: March 10, 1980.

FOR FURTHER INFORMATION CONTACT: Jon H. Goldstein, Office of Policy Analysis, Department of the Interior, Room 4153, Interior Building, 18th & C Streets, N.W., Washington, D.C. 20240, 202-343-8501. Joan Mackenzie, Office of The General Counsel, National Oceanic and Atmospheric Administration, Washington, D.C. 20230, 202-377-4080.

SUPPLEMENTARY INFORMATION:

The Exemption Process

The Endangered Species Act Amendments of 1978 (PL 95-632), enacted on November 10, 1978, establish a procedure whereby certain Federal actions may be considered for exemption from the requirements of Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536a. This procedure was amended by the Endangered Species Act Amendments of 1979 (PL 96-159), enacted December 28, 1979. Section 7(a)(2) requires Federal agencies to insure that any actions which they authorize, fund, or carry out, are not likely to jeopardize the continued existence of endangered or threatened species or destroy or adversely modify critical habitats. Applications for exemptions may be considered only if made by Federal agencies, by Governors of States in which an agency action will occur, or by persons whose permit or license applications have been denied primarily because of section 7(a)(2). Applications are to be made to the Secretary (Interior or Commerce), and evaluated by a review board and, if certain criteria are met, by the Endangered Species Committee.

Review Boards. Review boards are to be established for each exemption application with the purpose of making threshold determinations on the application and, if certain threshold determinations are made, of developing a comprehensive record and report for the Endangered Species Committee. Review boards are to be composed of three members: one member appointed by the Secretary; one member (who is a resident of the State, if any, in which the agency action will be, or is being, carried out) appointed by the President; and an Administrative Law Judge. Review boards are to make four threshold determinations by majority vote within 60 days of appointment:

(1) Whether an irresolvable conflict exists;

(2) Whether consultation was carried out in good faith and whether the Federal agency or permit or license applicant, if any, made a reasonable and responsible effort to develop and fairly consider any reasonable and prudent alternatives that would have avoided an irresolvable conflict;

(3) Whether the Federal agency conducted any biological assessment required for construction projects; and

(4) Whether the Federal agency and permit or license applicant (if any) have refrained from making any irreversible or irretrievable commitment of resources with respect to the agency action that forecloses any reasonable or prudent alternatives that would avoid an irresolvable conflict.

Unless the review board makes affirmative determinations on all four questions, the application procedure ends. If the review board determines that all of the requirements are met, it must submit a report to the Endangered Species Committee within an additional 180 days discussing:

(1) The availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(2) A summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance; and

(3) Appropriate reasonable mitigation and enhancement measures which should be considered by the Committee.

Endangered Species Committee. The Endangered Species Committee consists of:

(1) The Secretary of the Interior, who is chairman;

(2) The Secretary of Agriculture;

(3) The Secretary of the Army;

(4) The Chairman of the Council of Economic Advisors;

(5) The Administrator of the Environmental Protection Agency;

(6) The Administrator of the National Oceanic and Atmospheric Administration;

(7) For each exemption application, one individual from each affected state, appointed by the President, casting a single vote collectively. The Committee must determine whether or not to grant an exemption within 90 days after receiving the review board's report. An exemption requires an affirmative vote of five or more Committee members, voting in person. To grant an exemption, the Committee must determine that:

(1) There are no reasonable and prudent alternatives to the agency action;

(2) The benefits of the action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and the action is in the public interest; and

(3) The action is of regional or national significance.

In granting an exemption, the Committee also must establish those reasonable mitigation and enhancement measures necessary and appropriate to minimize the adverse effects of the agency action upon the listed species or critical habitat concerned.

Once an exemption is granted by the Committee, a Federal agency may proceed with the proposed action, but must conform to any mitigation and enhancement measures ordered by the Committee, and must report annually on these measures to the Council on Environmental Quality until all such measures have been completed.

Application Regulations

The scope of these regulations is limited to procedures for filing exemption applications, duties of the Departments of Commerce and Interior with respect to the applications, and the relationship between the Departments and the Endangered Species Committee and review boards. They do not set out general review board and Committee procedures, which will be issued by the Committee.

The Department of the Interior, as lead agency in development of these regulations, has determined that this document does not contain a significant rule according to criteria established by the Department of the Interior pursuant to Executive Order 12044.

Proposed Rules

The proposed rules on Endangered Species Exemption applications were published in the **Federal Register** for public comment on February 7, 1979, 44 FR 7777.

The comment period closed on April 9, 1979. Action on final regulations was deferred, however, pending Congressional action on technical amendments to section 7 of the Endangered Species Act.

As proposed, these regulations were to be designated as Part 403 of Title 50. Subsequent to issuance of the proposal, the Endangered Species Committee adopted interim procedural regulations which appear in Parts 450, 452 and 453 of Title 50. So that all regulations pertaining to the exemption process appear together, the regulations have been redesignated as Part 451 of Title 50.

Comments and Modifications in Proposal

Six timely comments on the proposed rules were received. These comments have been carefully considered and numerous suggestions made by the commenters have been adopted.

The comments received and reasons for accepting or rejecting them are as follows:

A. Comments on the Definitions

Several comments related to the definitions contained in proposed § 403.01. Subsequent to the close of the comment period, the Endangered Species Committee issued interim regulations, including 50 CFR 450.01, which contains extensive definitions. For purposes of consistency, new § 451.01 adopts the definitions used in the Committee regulations.

In drafting the definitions in its interim regulations, the Committee took account of the comments received on proposed § 403.01. The actions taken by the Committee in response to these comments are as follows:

1. One commenter suggested that the definition of "alternative courses of action" expressly include "no action". This suggestion was adopted. Adding the words "including no action" to the definition is consistent with the Endangered Species Act, as amended (the Act) and makes the definition more complete.

2. One commenter stated that the definition of "irresolvable conflict" should be modified by changing the phrase "completion of such action may jeopardize . . ." to "completion of such action would jeopardize . . ." The Committee's interim regulations defined "irresolvable conflict" to mean "a situation in which a proposed agency action, together with any cumulative effects, would violate section 7(a)." The 1979 Amendments to the Act revised section 3(11) to define "irresolvable conflict" as "a set of circumstances under which . . . completion of such [Federal agency] action would violate section 7(a)(2)." It is anticipated that the Committee, when it issues its final regulations, will track the language of section 3(11), as revised.

3. Two commenters recommended that the definition of "mitigation and enhancement" be modified. One commenter recommended that the definition include certain examples of mitigation and enhancement measures. This recommendation was adopted. The included examples are specified in the Act at section 7(h)(1)(B). The other commenter suggested that a second sentence be added to the definition stating that the "required acts must be reasonable in their cost, likelihood of protecting the listed species, the availability of the technology required to make them effective and other considerations deemed relevant to the Committee." This suggestion was adopted. The language reflects the clear intent of Congress as expressed in the Committee Reports on the 1978 Amendments and makes the definition more complete.

4. One commenter suggested that the term "affected state" be defined in the regulations. This suggestion was not adopted. The Statute states that the President "shall appoint one individual to the Committee from each affected State, as determined by the Secretary." § 7(e)(3)(5). The Secretary's decision should be made on a case by case basis, taking into account all of the various, unique factors of each application.

5. One commenter recommended that both "Federal agency" and "permit or license applicant" be defined. This suggestion was adopted in the interest of completeness. The terms were defined to parallel their statutory counterparts.

6. One commenter expressed concern with the use of the phrase "biological opinion". To address this concern, the terms "biological opinion" and "biological assessment" were defined in a manner which clearly distinguishes the two and identifies each with its statutory basis.

B. Comments on the Contents of the Application

1. Five commenters recommended changes in the section addressing the contents of the application. Two major concerns were expressed.

(a) First, two commenters recommended that applicants be allowed to submit information in two stages. These commenters noted that requiring applicants to generate and submit information bearing upon the Endangered Species Committee's final determination before the review board has made its threshold determinations is potentially wasteful and confusing. In response to these comments, the requirements for information bearing on the Committee's final determination have been somewhat modified. The final regulations require, nonetheless, that an applicant submit a statement discussing fully the reasons why the proposed action meets the criteria for exemption. This requirement is dictated in part by the Act itself. Section 7(g)(2)(A) of the Act clearly states that the initial application "shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection." Similarily, the Conference Report on the 1978 Amendments states that "[t]he application must be filed within 90 days after completion of consultation and must set forth a statement detailing why the agency action is qualified for an exemption." The requirement is also dictated by need to provide an information base on which the Secretary can provide his views and recommendations on an application. Under section 7(g)(4) of the Act, these views and recommendations must be submitted to the review board within 60 days of receipt of an application. Requiring an adequate statement from an applicant on the exemption criteria additionally assures that the exemption process will not be invoked lightly by applicants who have not carefully considered whether they can meet the criteria.

(b) Second, three commenters suggested that many applicants would find it difficult, if not impossible, to generate all of the required application information. We have carefully balanced this concern with the concern that review boards receive sufficient information from the applicant to process applications effectively. The final regulations recognize the ability (or limitations on the ability) of applicants (Federal agencies, permit or license applicants and Governors) to obtain and transmit information to the review board. For some categories of information, the regulations require that the applicant submit information only "to the extent that such information is available to the applicant." The phrase "to the extent that such information is available to the applicant" is defined to mean "all pertinent information the applicant has on the subject matter at the time the application is submitted, and, if this information is not complete, all pertinent information obtainable from the appropriate Federal agency pursuant to a Freedom of Information Act request."

2. One commenter suggested that the regulations should not require the applicants to list every resource committed subsequent to the initiation of consultation, but rather should only require the applicant to describe those resources irreversibly or irretrievably committed. This suggestion has not been adopted. The question of whether resources have been irreversibly or irretrievably committed is one for the review board to decide based on

information concerning any resource commitments which have been made.

3. One commenter pointed out that much of the information required in the application is included in pre-existing documents such as environmental impact statements. It is the intent of the regulations to permit applicants to refer to or to excerpt information from pre-existing sources. Nothing in the regulations as now written precludes applicants from relying on pre-existing information.

C. Comments on the Application Process

1. One commenter recommended that the regulations include an application screening provision. In the interests of efficiency, this suggestion has been adopted. The final regulations provide for an initial review of each application by the Secretary. Where a question concerning the application exists or appears to exist, the Secretary may determine that the applicant or the application does not meet the statutory requirements for applying. If the Secretary determines that the qualification issue should be the subject of an adversary review, he shall refer the issue to the review board for a decision.

2. One commenter suggested that the regulations allot a Governor 15, rather than 10, days to make his recommendations for review board and Committee appointments. This suggestion has not been adopted. The Act provides that after receiving the Governor's recommendations, the Secretary must transmit these recommendations to the President. The President must then make a decision. In order to give the President sufficient time to make his decision within 30 days after an application is filed, the Secretary must receive the Governor's recommendations within 10 days.

3. One commenter suggested that the review board should be given less than 180 days to prepare its report if it requests the applicant to submit detailed statements on the matters covered by the report. This suggestion has not been adopted. The Act provides for 180 days. Because of the complexity of the issues involved, each review board should be allowed when necessary to use the full 180 days statutory maximum to prepare its report.

4. One commenter noted that proposed § 403.03(d) should require the Secretary to submit his view to the review board in writing. This suggestion has been adopted. Authority for this change is found in section 7(g)(4) of the Act.

D. Other Comments

1. One commenter stated that the regulations should not require the Secretary to submit a copy of the exemption application to the Chairman of the Council on Environmental Quality. This recommendation has been adopted. The Council will be notified that an exemption application has been filed by a general **Federal Register** notice (described below). Should the Council request a copy of the application, the Secretary will provide one.

2. One commenter observed that the regulations should prescribe an exemption process for emergency situations. We have determined that emergency exemptions should be addressed on a case by case basis.

3. Several commenters raised the question of the appropriate timing for applications from permit or license applicants. That question has been resolved by the 1979 Amendments to section 7(g)(2)(A) of the Act. That section now requires that in a case involving a license or permit applicant a written application for an exemption shall be submitted "not later than 90 days after the date on which the Federal agency concerned takes final agency action, for purposes of chapter 7 or title 5, United States Code, with respect to the issuance of the permit or license." This change is reflected in the regulations.

4. One commenter suggested that the proposed regulations contain a general policy statement declaring that the exemption process is a measure of last resort. This suggestion has not been adopted. These regulations are procedural. While both Departments believe that the exemption process should only be initiated after good faith consultation has been conducted, and while both the Secretary of the Interior and the President have articulated this position, we do not believe that it is appropriate to include a policy statement in these regulations.

5. One commenter suggested the Secretary notify the public when an application exemption has been filed. This suggestion has been adopted. The final regulations provide that upon receiving an exemption application the Secretary shall promptly publish a notice in the Federal Register setting forth information on the application.

Other Changes

Technical changes have also been made to conform these regulations to the 1979 Amendments to the Endangered Species Act.

Drafting Information

The principal author of the final version of these procedures was Deborah Williams, Office of the Solicitor, U.S. Department of the Interior, 907-271-4131.

Pursuant to authority provided by section 7(f) of the Endangered Species Act, as amended, 16 U.S.C. 1536(f), the following new Part 451 is added to Chapter IV, Subchapter C, of Title 50:

PART 451—APPLICATION PROCEDURE

Sec.

451.01 Definitions.
451.02 Applications for Exemptions.
451.03 Review Boards.
451.04 Endangered Species Committee.

Authority: Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

§ 451.01 Definitions.

All definitions contained in 50 CFR 450.01 are applicable to this part.

§ 451.02 Applications for exemptions.

(a) *Scope.* This section prescribes the application procedures for applying for an exemption from the requirements of section 7(a)(2) of the Endangered Species Act, as amended.

(b) *Where to apply.* Applications should be made to the appropriate Secretary(ies) by writing:

(1) The Secretary, Attention: Endangered Species Committee, Room 4160, Department of the Interior, 18th & C Streets, N.W., Washington, D.C. 20240.

(2) The Secretary, Department of Commerce, 14th Street & Constitution Ave., N.W., Washington, D.C. 20030.

(c) *Who may apply.* Applications for exemptions shall only be made by (1) a Federal agency, (2) the Governor of a State in which the proposed agency action may occur, or (3) a person who has received a final denial for the purposes of chapter 7, Title 5, United States Code of an application to a Federal agency for a permit or license primarily because of section 7(a)(2) considerations.

(d) *When to apply.* (1) Except in the case of agency action involving a permit or license application, an application for an exemption must be submitted to the Secretary within 90 days following the termination of the consultation process.

(2) In the case of agency action involving a permit or license application, data on which the Federal agency concerned takes final action, for purposes of chapter 7 of title 5, United States Code, with respect to such agency action.

(3) In either case, an application for exemption which otherwise meets the requirements of section 7(g) of the Act,

16 U.S.C. 1536(g), may be submitted within 90 days following the effective date of these regulations.

(e) *Contents of the application when submitted.* Exemption applicants must provide the following information at the time the application is submitted.

(1) Applicant's name, mailing address, and phone number, including the name and telephone number of an individual to be contacted regarding the application.

(2) If the applicant is a Federal agency: (i) A comprehensive description of the proposed agency action.

(ii) In the case of a denial of a license or permit a description of the permit or license sought from or by the Federal agency, including a statement of who in the Federal agency denied the permit or license and the grounds for the denial.

(iii) A description of all permit(s), license(s) or other legal requirement(s) which have been satisfied or obtained, or which must still be satisfied or obtained, before the proposed action can proceed.

(iv) A description of the consultation process carried out pursuant to section 7(a) of the Act.

(v) A copy of the biological assessment, if one was prepared.

(vi) A copy of the biological opinion. If the biological opinion was issued before the effective date of these regulations, a statement by the agency which issued such opinion that it has reviewed the opinion since the effective date of these regulations and has found it valid and sufficient under the Act.

(vii) A description of each alternative to the proposed action considered by the Federal agency.

(viii) A statement describing why the proposed agency action cannot be altered or modified to avoid jeopardizing the identified endangered species, threatened species or critical habitat(s).

(ix) A list of resources committed by the agency to the proposed action subsequent to the initiation of consultation.

(3) If the applicant is a permit or license applicant: (i) A comprehensive description of the applicant's proposed action.

(ii) A description of the permit of license sought from the Federal agency, including a statement of who in the federal agency denied the permit or license and the grounds for the denial.

(iii) A description of all permit(s), license(s) or other legal requirement(s) which have been satisfied or obtained, or which must still be satisfied or obtained, before it can proceed with the proposed action.

(iv) A copy of the permit or license denial.

(v) A copy of the biological assessment, if one was prepared.

(vi) A copy of the biological opinion. If the biological opinion was issued before the effective date of these regulations, a statement by the agency which issued such opinion that it has reviewed the opinion since the effective date of these regulations, and found it valid and sufficient under the Act.

(vii) A description of the consultation process carried out pursuant to section 7(a) of the Act, to the extent that such information is available to the applicant.

(viii) A description of each alternative to the proposed action considered by the applicant, and to the extent that such information is available to the applicant, a description of each alternative to the proposed action considered by the Federal agency.

(ix) A statement describing why the applicant's proposed action cannot be altered or modified to avoid jeopardizing the endangered species, threatened species or critical habitat(s).

(x) A list of resources committed to the proposed action by the permit or license applicant subsequent to the initiation of consultation.

(4) If the applicant is the Governor of a State in which the proposed agency action may occur: (i) A comprehensive description of the proposed agency action.

(ii) A copy of the biological assessment, if one was prepared.

(iii) A copy of the biological opinion. If the biological opinion was issued before the effective date of these regulations, a statement by the agency which issued such opinion that it has reviewed the opinion since the effective date of these regulations and has found it valid and sufficient under the Act.

(iv) A description of the consultation process carried out pursuant to action 7(a) of the Act, to the extent that such information is available to the Governor.

(v) A description of all alternatives considered by the Federal agency, to the extent that such information is available to the Governor.

(vi) A statement describing why the proposed Federal action cannot be altered or modified to avoid jeopardizing the identified endangered species, threatened species or critical habitat(s).

(vii) A list of resources committed to the proposed action subsequent to the initiation of consultation, to the event that such information is available to the Governor.

(5) Each applicant, whether a Federal agency, permit or license applicant, or Governor, must also submit the following: (i) A full statement of the nature and the extent of the benefits of the proposed action.

(ii) A full discussion of why the benefits of the proposed action clearly outweigh the benefits of each considered alternative course of action.

(iii) A full discussion of why none of the considered alternatives are reasonable and prudent.

(iv) A full statement explaining why the proposed action is in the public interest.

(v) A full explanation of why the action is of regional or national significance.

(vi) A full discussion of mitigation and enhancement measures proposed to be undertaken if an exemption is granted.

(f) *Additional Information Required From the Applicant.* If the review board makes a positive finding on each of the threshold determinations set forth in section 7(g)(5) of the Act, the review board may require the applicant to submit further discussions of the information required by paragraphs (e)(5) (ii), (iii), (iv), (v), and (vi) of this section.

(g) *Initial Review of the Application.* (1) Upon receiving the application, the Secretary shall review the contents thereof and consider whether the application complies with the requirements set forth in paragraphs (c), (d) and (e) of this section.

(2) The Secretary shall reject an application within 10 days of receiving it if he determines that it does not comply with paragraphs (c), (d) and (e). When the Secretary rejects an application, a review board will not be empaneled.

(3) If the Secretary does not reject the application within 10 days of receiving it, but if the Secretary determines that a serious question exists regarding the application's compliance with requirements set forth in paragraphs (c), (d) or (e) of this section, he shall refer the issue to the review board for consideration at a pre-hearing conference within 30 days of empanelling. The review board shall reject the application if the review board finds that the application does not comply with paragraph (c) or (d) or (e) of this section.

(h) *Notification of the Secretary of State.* The Secretary will promptly transmit to the Secretary of State a copy of all applications submitted in accordance with § 451.02 of this part.

(i) *Public Notification.* Upon receipt of an application for exemption, the Secretary shall promptly publish a notice in the **Federal Register** (1) announcing that an application has been filed, (2) stating the applicant's name, (3) briefly describing the proposed agency action and the result of the consultation process, (4) designating the place where copies of the application can be obtained and (5) specifying the name of the person to contact for further information. The Secretary will mail copies of the Federal Register notice to each member of the Committee.

§ 451.03 Review Boards.

(a) *Scope.* This section contains provisions governing the relationship between the Secretary and review boards.

(b) *Appointment.* Review boards will be appointed as follows: (1) A member appointed by the Secretary. One member of the review board will be appointed by the Secretary not later than 15 days after an application is submitted.

(2) A State member. (i) When one or more States are affected, the Secretary will notify the Governors of each affected State in writing and request them to recommend residents of the State(s) in which the agency action will be, or is being, carried out for appointment to the review board. Written recommendation of these Governors must be received by the Secretary within 10 days after receipt of notification. The Secretary will transmit the Governors' recommendations to the President and will request the President to appoint, within 30 days after the application for exemption was submitted, a State resident from the State(s) in which the agency action will be, or is being carried out.

(ii) When no State is affected, the Secretary will submit to the President a list of individuals with expertise relevant to the application, and will request the President to appoint an individual to the review board within 30 days after the application for exemption was submitted.

(3) An Administrative Law Judge. The Secretary will request the Office of Personnel Management to appoint within 30 days after the application is submitted, an Administrative Law Judge to serve on the review board.

(4) If biological opinions of both the Secretary of the Interior and the Secretary of Commerce indicate that an agency action would violate section 7(a)(2) of the Act, the Secretaries shall jointly convene a review board to consider any application for exemption filed with respect to such agency action.

(c) *Submission of application to the review board.* Following appointment of all members of a review board under subsection paragraph (b) of this section, the Secretary will submit a copy of the exemption application to each member.

(d) *Secretary's views.* Within 60 days after receiving an exemption application in accordance with § 451.02, the Secretary shall (unless a longer time is agreed to with the exemption application) submit his views on the application to the review board in writing.

§ 451.04 Endangered Species Committee.

(a) *Scope.* This section contains provisions governing the relationship between the Secretary and the Endangered Species Committee.

(b) *Appointment of State member.* (1) Concurrently with notification under § 451.03(b)(2)(i) of this part, the Secretary will request the Governors of each affected State to recommend individuals to be appointed to the Endangered Species Committee. Written recommendations of these Governors must be received by the Secretary within 10 days of receipt of notification. The Secretary will transmit the Governors' recommendations to the President and will request that the President appoint a State resident to the Endangered Species Committee from each affected State, within 30 days after the application for exemption was submitted.

(2) When no State is affected, the Secretary will submit to the President a list of individuals with expertise relevant to the application and will request the President to appoint an individual to the Endangered Species Committee on or before 30 days after the application for exemption was submitted.

Dated: Feburary 4, 1980.

Larry Meierotto,

Assistant Secretary of the Interior for Policy, Budget and Administration.

James P. Walsh,

Deputy Administrator, National Oceanic and Atmospheric Administration.

[FR Doc. 80-4203 Filed 2-7-80; 8:45 a.m.]

BILLING CODE 4310-10-M

TAB G
FISH AND WILDLIFE
COORDINATION

federal register

Friday
May 18, 1979

Part V

Department of the Interior

Office of the Secretary

Department of Commerce

National Oceanic and Atmospheric Administration

Fish and Wildlife Coordination Act, Uniform Procedures for Compliance

DEPARTMENT OF THE INTERIOR

Office of the Secretary

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[50 CFR Part 410]

Fish and Wildlife Coordination Act; Notice of Proposed Rulemaking

AGENCY: National Oceanic and Atmospheric Administration, Commerce; Office of the Secretary, Interior.

ACTION: Proposed rulemaking.

SUMMARY: This Notice invites public participation in the development of rules which would establish uniform procedures for federal agency compliance with the Fish and Wildlife Coordination Act (FWCA). The President's Water Policy Message of June 6, 1978 and the President's Water Policy Memorandum dated July 12, 1978, directed the publication of these rules. These rules would standardize agency procedures and interagency relationships in the analysis of the impacts of federal, or federally-approved, water-related projects upon wildlife resources. They relate closely to the procedures established for compliance with the National Enviornmental Policy Act [NEPA].

DATES: Written comments must be received no later than July 17, 1979.

ADDRESS: Comments should be addressed to: Associate Director (AE), Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

Written and oral comments will be received at public hearings to be convened in the following cities on dates to be later announced by notice published in the Federal Register:

Arlington (Dallas/Ft. Worth), Texas
Washington, D.C.
San Francisco, California
New Orleans, Louisiana
Denver, Colorado

FOR FURTHER INFORMATION CONTACT:

Thomas J. Bond, Fish and Wildlife Service, Division of Ecological Services, 18th and E Sts. NW., Washington, D.C. 20240, (202) 653–5952.

James R. Chambers, National Marine Fisheries Service, 3300 Whitehaven St. NW., Page Building II, Washington, DC 20235, (202) 634–7940.

SUPPLEMENTARY INFORMATION:

I. Procedural Background

In a Water Policy Memorandum dated July 12, 1978, President Carter directed that—

> The Secretary of the Interior in cooperation with the Secretary of Commerce shall promulgate regulations by March 1, 1979, defining the requirements and procedures that must be met for fully complying with the Fish and Wildlife Coordination Act * * * Then, not later than 3 months after promulgation of such final regulations, Federal agencies with consultative responsibilities under the [FWCA] shall publish . . . separate procedures to be followed in implementing the regulations for [the FWCA]. These procedures shall be reviewed, and if consistent with the regulations, approved within 60 days by the Secretary of the Interior . . . and shall be published in final form. These regulations shall include acceptable methods for determining adequate measures to prevent or to mitigate losses to fish, wildlife, . . . and other resources protected by [the FWCA] . . . and procedures to ensure compliance of all projects not yet constructed with [the FWCA] and these regulations.[1]

A Notice of Intent to Propose Rules under the FWCA was published in the Federal Register on September 29, 1978. 43 FR 44870–44872. We received a large number of responses to the questions asked in that Notice, particularly from state fish and wildlife agencies. The staff of the Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration (NOAA) which participated in the drafting of these rules held numerous conferences with interested Congressional staffs and with most federal agencies which would be affected by these rules. In addition, the President's Water Policy Implementation Task Force on Environmental Statutes discussed, and held public hearings on, the President's proposal for FWCA rules.

II. The FWCA

The FWCA requires federal agencies (hereinafter "action agencies") which propose, or are authorized, to undertake the impoundment, diversion, deepening, or other control or modification of waters of any stream or other body of water, or which are asked to approve such activity in some way, to provide wildlife conservation equal consideration with other features of such projects throughout the agencies' planning and decision-making processes. It requires such agencies, or applicants to such agencies, to first consult with state and federal wildlife agencies with a view to ascertaining what project facilities, operations, or measures may be considered necessary by those agencies to mitigate and compensate for project-occasioned losses to wildlife resources, as well as to enhance those resources.

The FWCA further requires that the reports and recommendations of wildlife agencies on the wildlife aspects of such projects shall be presented to action agency decision-makers and (where applicable) the Congress, and that the action agencies shall give full consideration to those reports. Action agencies are required to include in project plans such means and measures for wildlife conservation as they may find justifiable to obtain maximum overall project benefits, and the costs thereof are to be considered integral to those of the project.

III. Relationship of the FWCA and This Proposal to NEPA and Other Environmental Review Requirements

Because of the breadth of the concerns imposed upon wildlife agencies by the FWCA, more is required of wildlife agencies in carrying out their commenting responsibilities under NEPA than is required of most other agencies who comment upon environmental impact statements (EIS). The Eighth U.S. Circuit Court of Appeals has noted that "[t]he proposed mitigation plans go to the very heart of the question before the [agency] preparing its environmental impact statement—whether the project should proceed at the present time in view of its environmental consequences." *Environmental Defense Fund v. Froehlke*, [Cache River], 473 F.2d 346, 351 (8th Cir. 1972).

The procedures established in these proposed FWCA rules can be carried out at the same time that action agencies are complying with the NEPA regulations, particularly prior to and during the preparation of a draft EIS.[3]

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[1] The President also directed the submission of annual reports to the Office of Management and Budget which demonstrate compliance with environmental protection statutes, including the FWCA. Finally, the President directed that—

In all project construction appropriation requests, agencies shall include designated funds for all environmental mitigation required for the project and shall require that mitigation funds be spent concurrently and proportionately with construction funds throughout the life of the project.

These reporting and funding directives are being analyzed by the President's Water Policy Implementation Task Force on Environmental Statutes and are not addressed in this Notice. However, should that Task Force so recommend, these rules may be amended at a later date to incorporate the procedures adopted for complying with these latter two directives.

[3] It has been stated that "compliance with the National Environmental Policy Act . . . is *de facto* compliance with [the FWCA]." *Cape Henry Bird Club v. Laird*, 359 F. Supp. 404 (W.D. Va. 1973). This conclusion was presumed by that Court to be justified by *Environmental Defense Fund, Inc. v. Corps of Engineers* [Gillham Dam], 325 F. Supp. 749, 754 (E.D. Ark. 1971), which held that where a federal agency observes the requirements of NEPA, "it will automatically take into consideration all factors

Footnotes continued on next page

The relationship between the NEPA regulations and these proposed rules has been carefully drawn here and specific cross-citations have been made to the NEPA regulations where appropriate. § 410.3 (definitions of "compensation," "loss prevention," "mitigation"); § 410.16(a); (general relationship); § 410.15 (lead agencies); § 410.22(b)(4) (scoping); § 410.22(a)(1) (preliminary review of applications); § 410.23(b) (timing of reports by wildlife agencies); § 410.24(a)(2) (findings on justification for wildlife mitigation measures in draft EIS); §§ 410.32(b), 410.32(d)(1)(I) (compliance with NEPA in development of General Plans); § 410.33(c) (post-authorization monitoring).

The requirements of NEPA and the FWCA are similar in many respects. First, by requiring that wildlife conservation be given "equal consideration" with other features of water resource development programs, the FWCA assigns a weight to wildlife values in making determinations on the content of Federal project plans or Federal approvals. This parallels the goals and policies of Section 101 of NEPA, and the requirements in Section 102(4) and (B) that agencies use a systematic interdisciplinary approach to insure that environmental values and amenities are given appropriate consideration along with economic and technical factors. The legislative history of the FWCA shows that Congress was prepared to accept a reduction in the benefits of other project purposes in order to obtain the benefits of fish and wildlife conservation.

Secondly, NEPA's requirement that wildlife impacts and mitigation alternatives be considered in environmental impact statements carries with it an obligation to undertake mitigation activities to the fullest extent possible in order to achieve the goals of Section 101. See NEPA Section 102 and 40 CFR 1505.2(c) and 1505.3. The FWCA requires (1) the preparation of a plan containing specific measures to mitigate and compensate wildlife losses, as well as to enhance wildlife resources, (2) the submission of that plan to Congress at the same time project reports are submitted, and, (3) the implementation of the authorized mitigation plan concurrently with construction.

The FWCA is more than a mere consultative responsibility; it is an affirmative mandate to action agencies, of which consultation with wildlife agencies is only a part. Like NEPA, it requires early planning and post-consultation findings and implementation. Moreover, it speaks specifically to benefit-cost calculations and allocates responsibilities for paying the costs of mitigation. 16 U.S.C. 662(c),(d), 663(b). This complements the requirements of NEPA's Sections 102(2)(C) and 102(2)(E). In the case of projects requiring EIS's, the NEPA regulations provide that when benefit-cost analyses are prepared, they shall be incorporated by reference or appended to the EIS to assist in the evaluation of alternatives, and of environmental consequence. 40 CFR 1502.23. These proposed reguations are thus fully consistent with and complement NEPA and the NEPA regulations.

These rules will also advance the President's directive that federal agencies should coordinate and simplify invironmental review requirements. See President's Invironmental Message of May 23, 1977, 13 WEEKLY COMP. OF PRES. DOC. 782, 794. FWCA compliance is to be coordinated with other federal environmental review requirements. See §§ 410.23(b) and 410.23(c)(6).

In addition, § 410. 15 permits two or more action agencies which each have jurisdiction over an action, and which would separately have to comply with the FWCA, to complete the consultation and reporting phases of FWCA compliance through one (lead) agency. Section 410.16(b) requires action agencies which are considering the approval of a project to which the FWCA applies to require their applicants to make a showing of compliance with other permit programs to which the FWCA applies separately; namely, sections 402 and 404 of the Clean Water Act and sections 9 and 10 of the River and Harbor Act of 1899. Action agency observance of these two provisions could avoid placing wildlife agencies in the position of commenting upon the same proposed project at different times. This is the "two bites at the apple" problem which is posed for any federal agency administering a federal environmental review requirement respecting an action over which several other federal agencies may also initiate primary jurisdiction. This problem is exacerbated when an applicant for one of these various federal approvals makes application to the agencies at different points in time. Such results also occur when one federal regulation becomes applicable to a project only after the jurisdiction of another agency has been invoked by an application filed under a different program.

IV. Applicability

Subpart B of these rules establishes a compliance procedure for all projects covered by the FWCA, with slightly different procedures applied, depending upon whether the project in question is federal or "non-federal." Latitude is provided to action agencies during the proposed rulemaking and implementing procedures phases of this initiative to discuss with the Secretary of the Interior and the Administrator of NOAA FWCA compliance procedures which would be carefully tailored to their individual needs and programs.

No procedures would be established in advance for FWCA compliance by comprehensive water and related land resources planning programs, for certain projects undertaken in emergencies, and for federal programs administered by states. An opportunity is provided during the proposed rulemaking and implementing procedures phases of this initiative to devise FWCA review procedures appropriate to these types of activities.

V. Project Accounting

Several provisions of these proposed rules should resolve some of the confusion which exists over the treatment of wildlife resource-related project accounting for benefit-cost, reimbursement, and budgeting purposes. These rules make a distinction between "mitigation" and "enhancement". See § 410.3. This is necessary for two reasons. First, the costs of installing fish and wildlife enhancement measures at federal projects are reimbursed to the United States under rules which differ substantially from those which govern the reimbursement of the costs of loss prevention and mitigation measures. *Compare* 16 U.S.C. 460*l*–12, *et seq.*, *with* 16 U.S.C. 662(b), 662(d).

Second, the costs of fish and wildlife loss prevention and mitigation measures are required by the FWCA to be considered as costs, not benefits, for the purposes of any benefit-cost analysis which may be required by other law. See § 410.24(b). Although the costs of adopted wildlife resource loss-compensation measures, and of uncompensated losses, would be figured as costs in the overall project benefit-

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Footnotes continued from last page
required by [the FWCA] and it is not reasonable to require them to do both separately." While it may not have been appropriate to require the Corps in that case to consult again with wildlife agencies—it having done so previously under NEPA—it is quite another matter to suggest the NEPA and the FWCA impose identical burdens. Other cases considering the relationship of the two Acts have recognized their distinct requirements. *Zobel v. Tabb*, 430 F.2d 199 (5th Cir. 1970); *Akers v. Resor*, 339 F. Supp. 1375 (D. Tenn. 1972); *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977); *Texas Committee on Natural Resources v. Alexander*, —— F. Supp.—— (E.D. Texas, December 8, 1978) unofficially reported 12 ERC 1878.

cost ratio, conservation measures would not be subjected to normal benefit-cost analysis in order to determine whether they are justified. See § 410.24(b)(3)(ii) and § 410.24(a)(2).

These rules also make it clear that the total costs of wildlife compensation measures (acquisition, operation, maintenance, replacement, and management) are to be included in cost analysis. See § 410.24(a)(2). In the case of federal profects, the budgeting of such costs will be by the construction agency, in order that the true costs of water projects can be recognized. See § 410.32(e); 16 U.S.C. 663(b). Lack of agency and Congressional attention to funding of OM&R costs has been a major factor foreclosing authorized mitigation.

VI. Techniques for Evaluating Project Impacts on Fish and Wildlife Resources

These rules respond to the President's directive that "these regulations shall include acceptable methods for determining adequate methods to prevent or to mitigate losses to fish, wildlife, * * * and other resources protected by * * *" the FWCA. This is consistent with and carries out NEPA's Section 102(2)(3), which requires "to the fullest extent possible" that all agencies identify and develop methods and procedures which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making, along with economic and technical considerations. These rules would require, at least for federal projects, that the federal construction agency receive, consider, and transmit to the Congress an analysis of the extent of wildlife resource productivity lost to, or gained with, the proposed project, and an analysis of the compensation measures which are required to replace that loss, measured in terms of equivalent wildlife resource productivity. See §§ 410.23(c)(3), 410.24(a)(1)(ii), 410.24(c). In preparing their reports under the FWCA, wildlife agencies are directed to use evaluation techniques in describing project effects and identifying conservation measures which are directed at qualifying and quantifying potential effects on wildlife, their habitat and related values. See § 410.23(c)(1). Action agency findings on conservation measures which they deem justifiable must be based upon the use of assessment and evaluation techniques reflecting wildlife habitat values. See § 410.24(b)(1).

VII. Section-by-Section Analysis

A general overview of the remaining, more significant provisions of the proposed rules follows. The FWCA and these rules apply to water-related federal actions; defined as "projects". Different procedures are provided, depending upon whether the projects in question are federal undertakings, as opposed to "non-federal" projects which are "approved" by a federal agency. These procedures are set forth in Subpart B.

In § 410.2, the terms "action agency", "approval", and "project" are defined. "Project" defines the kind and location of impacts covered by the FWCA. "Action agency" defines the kinds of federal actions which are the predicate for application of the FWCA. "Approval" refers to a federal agency action which provides entitlements for *non*-federal projects.

The terms "loss prevention", "mitigation", and "enhancement" have been defined and distinguished after extensive deliberations among wildlife resource planners. They are distinguished because (1) they have different economic and financial connotations (described above), and (2) in order to emphasize them as separate steps in the action agency approval and authorization process. Enhancement is recognized to be a separate planning objective which is just as important as mitigation. See §§ 410.24(b)(1), 410.21.

"Compensation" is used to state an objective or measure of loss prevention and mitigation planning. It is a term used in the FWCA.

The definition of "Regional Directors", as applied in § 410.22(a) (1) and (2), confirms the fact that the jurisdiction of the Departments of the Interior and Commerce over all projects to which the FWCA applies will be totally concurrent. It is recognized that different levels of effort will be devoted to various projects by the two federal agencies, depending upon such factors as project location, resource impact, program emphasis, and staffing. Should the pending proposal for executive reorganization become effective, appropriate changes will be made to this proposal.

"Wildlife agency" is defined and used to refer to federal and state wildlife agencies collectively. In the case of state agencies, the FWCA is construed to require consultation with the state agency which exercises "immediate and direct administration over the fish and wildlife resources" of the affected state or states.

"Wildlife" and "wildlife resources" are defined by taxonomic classifications, as well as by reference to habitat elements. As applied in § 410.24(b)(1), the rules require that action agencies consider impacts upon wildlife resource not only in the project area, but wherever they "occur". For example, an upstream water project could have significant impacts upon the wildlife resources of an estuary far removed from the project site.

"Wildlife resource properties", as applied in § 410.32, refers to areas designated by federal agencies in connection with federal projects for the conservation of wildlife resources. Areas set aside in connection with non-federal projects are not affected by these proposed rules.

Section 410.11(a) should resolve a great deal of confusion which has arisen over the applicability of the FWCA to certain federal programs, project locations, actions indirectly affecting water, and types of water resources. It is recognized that by defining the applicability of the FWCA, in part, by reference to actions which "depend upon, or necessarily result in, a diversion, control or other modification of a stream or other body of water," there will be a point at which the effects of that federal action upon water are remote. During proposed rulemaking or the implementing procedures phase of the President's initiative, action agencies and the public may recommend to the Secretary of the Interior whatever special compliance procedures they feel should be applied to these programs.

Section 410.11 (b) and (c) restate the exemptions or exclusions contained in the FWCA for certain programs or projects. Public and agency views are particularly solicited on the extent to which the FWCA applies to certain of such programs directly. Agreements have been reached between wildlife agencies and some of those agencies to insure that wildlife resource considerations are factored into their decision-making processes. These agreements will appear in the Appendices to this Part. Though the FWCA may not apply to such agency programs directly, the FWCA does apply through other agency environmental review programs applicable to these otherwise exempt projects and programs. The most apparent of those other agency programs are: the Section 103(b), 402, and 404 permit programs under the Clean Water Act; the permit programs under §§ 9 and 10 of the River and Harbor Act of 1899.

Section 410.12 deals with the timing and extent to which these rules will be applied to particular projects which are in various stages of authorization, approval, or construction. It is responsive to the President's directive that these rules should "insure compliance of all projects not yet constructed with [the FWCA]". This includes, *inter alia*, projects which are authorized and on which construction is not complete. Guidance is sought from the affected agencies and the public on screening criteria [see § 410.12(c)(1)] which could be use to selectively apply these rules to projects where construction has begun but has not yet advanced to a stage where compensation measures are foreclosed.

A vast potential exists for examining the fish and wildlife resource conservation potentials of authorized federal water projects, particularly those authorized many years ago. Should the procedures of Subpart B become applicable to such projects in accordance with this provision, the relevant decision-makers and the Congress would be provided with up-to-date analyses of the fish and wildlife resource needs and potentials of these projects.

It is understood that the views, needs, and rights of federal projects sponsors would be taken into account during the observance of these procedures, and in any later submissions which may be made to the Congress for implementing the ensuing recommendations of the Executive Branch.

Subpart B sets forth the basic FWCA compliance procedure. Section 410.21 provides substance to the term "equal consideration," as used in the FWCA. It emphasizes the relative weight to be accorded to wildlife resource conservation. It identifies enhancement as a separate project objective of equal importance with the objective of merely compensating for wildlife resource losses. It defines the FWCA compliance process as involving four steps; not just as the consultation and avoidance process which sometimes characterizes the practices of action and wildlife agencies today.

Section 410.22 largely restates existing action agency practices for the initiation of wildlife agency involvement in their planning and approval processes. The intent of this section is to get wildlife agencies involved early so that they can complete their necessarily extensive review in time for action agencies to use their input in a meaningful way. For larger projects which are likely to have the most significant impact upon wildlife resources, action agencies are required to provide, in their application procedures for non-federal projects, that applicants for such projects must provide documentation showing that the applicant has previously consulted with the wildlife agencies. This practice has been used successfully by the Federal Energy Regulatory Commission. Delays in action agency approval processes are avoided by the development of environmentally sound project applications. Often, tardy, post-application consultation with wildlife agencies places them in a reactive posture, often with a short time frame for response. The resultant delays caused by honest attempts to carry out FWCA responsibilities are characterized as faults in the FWCA and wildlife agencies.

No period of time is specified for this consultation in advance of the application in question. This is left to the judgment of the applicant. Since this procedure applies only in the case of larger projects—which doubtless will require an extensive period of pre-application planning—it should not be burdensome. To the extent that this procedure may encourage the filing of well-conceived applications, it will result in a saving of action agency resources.

Section 410.24 deals with the decision-making processes of action agencies. It requires action agencies to make a record of their decisions concerning the wildlife resource component of environmental mitigation. It also requires public disclosure of, and public participation in, action agency decisions on which wildlife conservation measures will be incorporated into the project. It identifies the financial cost of wildlife conservation measures as the subject of benefit-cost analysis. These cost are to be developed for alternatives so that a true comparison can be made among them, and so that, if an alternative to the primary proposal is selected, appropriate conservation measures are available for inclusion in the authorization.

Section 410.24(b)(3) specifies some considerations which may not be taken into account by action agencies in making the statutorily-required findings as to which wildlife conservation measures recommended by wildlife agencies are justified to maximize overall project benefits. Whereas it is true that action agencies have the ultimate authority under the FWCA to make these findings, it is also true that, at least in the case of federal projects, the Congress, not the federal action agency, makes the final determination. Moreover, these findings are made by action agencies in the context of certain objectives and requirements of the FWCA.

Paragraphs (b)(3)(ii) and (b)(3)(iii) of § 410.24 provoked much discussion during the preparation of these proposed rules, partly because they are misunderstood. These rules apply only to measures recommended for the "compensation" of wildlife resource losses, not to "enhancement." The FWCA provides that wildlife resource compensation measures are to be considered costs of doing business in public resource areas. Thus, the fact that measures necessary for compensation of wildlife resource losses may produce "benefits" under one of a number of different methods of calculation is totally irrelevant to the question of whether those measures are justified under the FWCA.

Similarly, the unwillingness of non-federal entities to fund or reimburse their statutory share of federal project costs otherwise deemed justified to compensate for wildlife resource losses should not be a reason for refusing to seek authorization of such measures. Paragraph 410.24(b)(3)(iii) does not apply to non-federal projects. If, prior to federal project authorization, non-federal entities indicate an unwillingness to fund an appropriate share of these project costs, the project would not be recommended for authorization. Subsequent to authorization, if the action agency determines that wildlife resource compensation measures which had not previously been authorized should be recommended for authorization, then alternative cost-sharing provisions can be recommended in those cases where non-federal entities are unwilling (e.g., by reason of contract rights) to share the costs. Nothing in these rules would require the adoption of such measure in those circumstances or require the imposition of such burdens on non-federal entities.

Section 410.32 should provide an incentive for wildlife agencies and action agencies to devote more attention to wildlife areas which had been proposed to justify project authorizations. If, as a result of the FWCA compliance process, a project is authorized in part upon the representation that land and water areas will be acquired and managed in order to replace the wildlife productivity lost to the project, and then the affected agencies do not provide resources to make good that representation, then the wildlife resource and the public have been short-changed. Bare acquisition, without management, is not mitigation.

VIII. Alternative Approaches

This discussion focuses upon alternatives which were considered to those provisions of these proposed rules which would make significant changes in action agency procedures.

The procedures contained in Subparts B and C apply to all projects to which the FWCA applies, unless they are rendered inapplicable by specific provision of these rules or by Secretarial action during the implementing procedures phase of the President's initiative. See § 410.12. The Departments of the Interior and Commerce are not in a position at this time to review and analyze all federal programs to determine whether the procedures of Subparts B and C can be meaningfully applied to all such programs. Action agencies are in a much better position to examine these questions in the first instance and to seek selective modification, when necessary.

Section 410.12(c) is responsive to the President's directive that these rules should apply to authorized but not completed *federal* projects. These rules would not apply to all such projects. In certain of these cases, the Secretary of the Interior can consider specified criteria and find that these procedures will be applied. In such cases, affected federal agencies are provided an opportunity to state whether they believe the rules should apply. However, if an authorized project is not exempt, action agencies are admonished not to make "any irreversible or irretrievable commitment of resources pending compliance with these rules which would foreclose the consideration of alternatives to compensate for wildlife resource losses."

Alternatives considered included a provision making these rules applicable immediately upon their effective date and a provision which would direct the action agencies not to seek funding for these projects until these rules were complied with. We also considered making these rules applicable to approved, non-federal projects. It was determined that the proposal adopted was the least burdensome alternative which was still acceptable from the standpoint of meeting the intent of the President's directive.

Section 410.22(a)(1) would require action agencies to change their procedures for receiving applications for non-federal projects which they approve. It would require a showing that the applicant undertook pre-application consultation with the wildlife agencies. This requirement applies only to applications for the larger, potentially more damaging projects (from the perspective of wildlife resource conservation). An alternative considered and rejected would have applied this procedure to all, or wider, classes of projects. Also rejected was a proposal to require pre-application consultation with wildlife agencies prior to a fixed period in advance of filing an application with the action agency. The proposal which was adopted was considered acceptable from the standpoint of promoting environmentally sound non-federal projects applications.

Although the findings which would be required of action agencies by § 410.24(a) are being made as a matter of practice by some action agencies, this provision was deemed necessary to ensure that wildlife agencies and the public are able to participate in this aspect of decision-making by all action agencies. In many cases, the wildlife agencies and the public are excluded from action agency decision-making on wildlife conservation recommendations and are provided no meaningful rationale for why they were rejected. Alternative procedures which were rejected included (1) publication of these findings in only one media (the **Federal Register**), (2) a provision requiring action agency decision-makers to provide their rationale for rejecting wildlife conservation measures recommended by their own staffs, and (3) a provision for mandatory public hearings upon the request of wildlife agencies.

Section 410.24(b)(1) requires that findings made by action agencies as to loss prevention and mitigation measures deemed justified to maximize overall project benefits "shall be made using assessment and evaluation techniques based upon wildlife habitat values. Monetary values may be displayed and used in measuring the cost-effectiveness of alternative mitigation plans but shall not be used for justification purposes." This provision recognizes the limitations of monetary or user-day computations of value in determining whether recommended loss prevention and mitigation measures will compensate for wildlife resources lost, and therefore should be adopted. Alternatives considered included a proposal that assessment and evaluation techniques based upon wildlife habitat values should be emphasized, but not required in such findings. Also considered and rejected was a provision requiring the use of a particular assessment and evaluation technique, once approved or certified by the Secretary of the Interior, coupled with a ban upon the use of other such techniques subsequent to certification.

The selected proposal serves the function of forcing wildlife and action agencies to focus upon losses to wildlife resources, rather than on the human use of such resources. If habitat productivity is lost to a project, no amount of human use of the project features will replace it. The fact that a value can be attached to human use of project features or of "replacement" habitat is gratuitous but bears no relation to the assessment of what must be done to replace habitat productivity lost to a project. The use of computational methods other than those based on wildlife habitat productivity (or values) has persisted because there has been insufficient incentive such as these rules to abandon them.

IX. Rulemaking Requirements

The Department of the Interior and the Department of Commerce have determined that the rulemaking procedures of the Department of the Interior will be followed. The Department of the Interior has determined that this document is a significant rule but does not require a regulatory analysis under Executive Order 12044, and 43 CFR Part 14. An environmental assessment has been prepared and is available from the Associate Director, Environment, Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240 [(202) 343-4767].

The policy of the Department of the Interior is, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, interested persons may submit written and oral comments, suggestions, or objections regarding this proposal in the manner set forth above.

In the Notice of Intent to Propose Rules, published at 43 FR 44870–44872, it was proposed that these rules be codified in Part 403 of Title 50, CFR. In order to provide more room in the 400 series of Title 50 for endangered species regulations, these joint rules will, when adopted, be codified as Part 410 of Title 50.

The joint authors of this document are:

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It is therefore proposed to amend 50 CFR, Chapter IV, by adding a new Part 410 in the manner set forth below.

Dated this 11 day of May, 1979.

James A. Joseph,

Acting Secretary of the Interior.

Elsa A. Porter,

Acting Secretary of Commerce.

PART 410—FISH AND WILDLIFE COORDINATION ACT

Subpart A—General Provisions

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Authority.—Fish and Wildlife Coordination Act, Pub. L. 85-264, 72 Stat. 563 (16 U.S.C. 661, *et seq.*); National Environmental Policy Act of 1969, sec. 102(2)(A) and (B), Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332(2)(A), (B)); 5 U.S.C. 552; Fish and Wildlife Act of 1956, sec. 7, 70 Stat. 1122 (16 U.S.C. 742f); President's Memorandum on Environmental Quality and Water Resources Management, July 12, 1978 [See also, Weekly Comp. of Pres. Doc. 106 (June 6, 1978)]; U.S.C. 301.

Subpart A—General Provisions

§ 410.1 Scope.

This Part implements the National Environmental Policy Act (NEPA), 42 U.S.C. 4332, and sections 1-4, 8, and 9 of the Fish and Wildlife Coordination Act (FWCA), 72 Stat. 563, as amended (16 U.S.C. 661-664, 666b, 666c (1976)). The FWCA recognizes that wildlife resources make a vital contribution to the Nation and that federal and non-federal water and related land resources developments will affect such resources. It mandates that wildlife conservation shall receive equal consideration and be coordinated with other features of water resource development programs throughout the action agencies' planning and decision-making processes. It requires such agencies, or applicants to such agencies, to first consult with state and federal wildlife agencies to ascertain what means and measures may be considered necessary by those agencies to prevent and mitigate project-related losses of wildlife resources, as well as to enhance those resources.

The FWCA further requires that reports and recommendations from wildlife agencies be presented to action agency decision-makers and (in the case of federal projects) the Congress, and that the action agencies shall give full consideration to those reports and recommendations. Action agencies are required to include in project plans such means and measures for wildlife conservation as they may find justifiable to obtain maximum overall project benefits to the public. The costs of such means and measures are to be considered integral to those of the project.

§ 410.2 Purpose.

The purpose of these rules is to ensure that wildlife conservation of fully considered and weighted equally with other project features in agency decision-making processes by integrating such considerations into project planning, NEPA compliance procedures, financial and economic analyses, authorization documents, and project implementation. This Part will—

(a) Establish procedures to be followed in achieving compliance with the FWCA in the development and consideration of alternative project plans which provide for the conservation of wildlife resources;

(b) Minimize delays in project authorization decisions and require the development of environmentally sound project plans without needless waste of public and private resources by establishing procedures for the timing and integration of FWCA compliance into decision-making processes while plans are still flexible;

(c) Ensure that planning for wildlife resource conservation measures addresses loss prevention, mitigation, compensation, and enhancement;

(d) Establish guidelines which ensure that applicants for selected classes of non-federal project approvals by action agencies will consult with wildlife agencies before making such applications;

(e) Describe factors to be considered by an action agency in determining what measures are justifiable to obtain maximum overall project benefits to the public;

(f) Require the use of techniques based upon habitat values as the means for assessing impacts on wildlife resources and for evaluating loss prevention, mitigation and compensation measures;

(g) Ensure that comparative benefit-cost analyses of alternative project plans include the construction, acquisition, operation, maintenance, and replacement costs of wildlife conservation measures, and, if quantifiable, the costs of uncompensated wildlife resource losses;

(h) Provide for inter-agency review of, and public participation in, wildlife and action agency decisions on means and measures for wildlife resource conservation.

§ 410.3 Definitions.

As used in this Part:

"Action agency" means a department, agency or instrumentality of the United States which plans, constructs, operates or maintains a project, or which plans for or approves a grant, loan, loan guarantee, financial or technical assistance, permit, lease, license, or contract for projects.

"Approval" or "approve" means final action agency action on an application by a federal, state, or other applicant for a grant, loan, loan guarantee, financial or technical assistance, permit, lease, license, or contract.

"Compensation" means completely offsetting losses to wildlife resource values using measures described in the NEPA regulations [40 CFR 1508.20].

"Conservation" means wildlife resource loss prevention, mitigation, compensation, and enhancement.

"Enhancement" means development or improvement of wildlife resource values of the area affected by the project beyond that which would occur without the project. This term is synonomous with the term "development and improvement," as used in the FWCA.

"Federal project" means a project planned or constructed by or on behalf of a federal agency.

"Loss prevention" means designing and implementing a project to avoid adverse impacts on wildlife resources. [40 CFR 1508.20(b)]

"Mitigation" means (1) lessening wildlife resource losses to a project through use of loss prevention measures and (2) offsetting losses through use of other structural and non-structural measures. [40 CFR 1508.20(b)–(e)]

"Project" means any action, or planning process which could condition an action, which impounds, diverts, deepens the channel of, or otherwise controls, pollutes, or modifies any water body for any purpose whatsoever. Such water bodies include, without limitation, wetlands and the waters of any stream, including their associated ground water, or estuarine or marine waters seaward to the outer margin of continental shelf (OCS) or fisheries conservation zone, whichever is farther.

"Regional Directors" means the named officials, or designees, of the Fish and Wildlife Service (FWS) [including the Area Director for Alaska] and the National Marine Fisheries Service (NMFS) in whose geographic areas of jurisdiction the project may be located. For projects outside the U.S. territorial sea, "Regional Director" means the named official of both agencies whose area of jurisdiction is closest to the project. [See App. A for addresses and areas of jurisdiction of federal Wildlife agency Regional Directors].

"Reporting Officer" means that action agency official responsible for preparing the project report, obtaining public and agency views, and making recommendations on a proposed project to higher authority (if any) within the agency. Implementing procedures of action agencies will identify appropriate reporting officer(s).

"Wildlife agency" means the FWS, NMFS, and, if the project is to be sited within the boundaries of States of the United States, the state agency(ies) exercising immediate and direct administration over the fish or wildlife resources of the particular state(s) wherein projects are proposed to be, or have been, constructed. For projects to be sited outside the territorial sea, this term means the head of the wildlife agency(ies) of the state(s) nearest the project.

"Wildlife" and "wildlife resources" mean birds, fish, mammals and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. "Wildlife resources" include the biotic and abiotic factors upon which wildlife depends; i.e. habitat.

"Wildlife resource properties" means the lands, waters, or interests therein to be acquired, reserved, or otherwise set aside by federal agency for the conservation of wildlife resources in connection with a federal project, pursuant to the provisions of section 3 and section 4 of the FWCA.

§ 410.11 Applicability of the FWCA.

(a) *General.* The FWCA applies to federal projects and to non-federal projects which are approved by an action agency. It applies to federal projects which are authorized by the federal construction agency itself, as well as those authorized by the Congress. Examples of projects covered by the FWCA are:

(1) Discharges of pollutants, including municpal, mining and industrial wastes or dredged and fill material, into water or wetlands;

(2) Those involving the construction, operation, or maintenance of channels, turning basins, or other navigation features;

(3) Those involving the construction of dams, impoundments, and/or water diversion structures for flood control, hydroelectric power generation, water supply, cooling ponds, irrigation, recreation, fish and wildlife, or other purposes;

(4) Those which depend upon, or necessarily result in, a diversion, control or other modification of a stream or other body of water, such as: federal water and hydro-power marketing, allocation or contracting decisions; changes in reservoir release and storage plans; diversions for or discharges from power plants; mineral exploration or extraction permits, leases, or licenses on the OCS; reservoir rights-of-way on federal or Indian trust lands; projects conducted in beds of intermittent streams, or those temporarily dewatered; water-related aspects of federal mining or mineral leases, or of mining plans adopted under the Surface Mining Control and Reclamation Act;

(5) Those undertaken to abate damages or causes of erosion, storms, or floods [See paragraph 410.22(a)(2)(iii) for expedited FWCA compliance procedures in these cases];

(6) Those involving the rehabilitation or lining of water conveyance systems;

(7) Water resource and water quality planning programs.

(b) *Previously authorized or approved projects.* Prior authorization or approval of a project does not constitute a waiver, *per se*, of FWCA requirements. By reason of section 2(g) of the FWCA, section 2 of the FWCA does not apply to projects (or project units) authorized or approved prior to August 12, 1958, which were completed or substantially completed on August 12, 1958. A project or project unit is deemed to be substantially completed when sixty percent or more of then-estimated construction costs (as of August 12, 1958) had been obligated for expenditure. However, the FWCA does apply to projects (or project units) authorized or approved prior to August 12, 1958, which were not substantially completed at that time, and to projects (or project units) authorized or approved subsequent to August 12, 1958, regardless of their state of construction or whether completed.

Section 2 applies to action agency initiation of a process of developing a report on the modification or supplementation of plans for previously authorized federal projects (whether or not constructed). It also applies to any application for the renewal or modification of a federal approval.

(c) *Agencies or agency projects specifically exempt from the FWCA.* The FWCA does not apply to the Tennessee Valley Authority, the small watershed program of the Soil Conservation Service (as authorized by Section 3 of the Watershed Protection and Flood Prevention Act of 1954), to impoundment projects where the aggregate maximum surface area of such impoundments is less than ten acres, or to activities for or in connection with programs primarily for land management and use carried out by federal agences with respect to federal lands under their jurisdiction. However, where such projects require other water-related federal approvals, the FWCA applies through those programs.

§ 410.12 Applicability of this part.

Except as provided in §§ 410.13, 410.14, and 410.22(a)(2)(iii), this Part shall apply to projects to which the FWCA applies and shall govern the content of implementing procedures issued in accordance with Subpart D. They shall become applicable as follows:

(a) *Projects not authorized or approved.* For projects in a planning phase and not yet approved or authorized for construction on the effective date of these rules, action agencies shall comply with the procedures and methods prescribed by this Part which are applicable to the planning or approval stages remaining on that date.

(b) *Completed or approved projects.* This Part applies upon action agency initiation of a process of developing a report on the modification or supplementation of plans for previously authorized federal projects (whether or not constructed). It applies to applications for renewal, modification, or relicensing of a non-federal project. It applies to actions which are defined as projects and which are proposed or undertaken at those authorized projects covered by § 410.11(b). These rules will apply to completed federal, and other federally-approved, projects as the action agency may, from time to time, determine practicable.

(c) *Authorized but not completed federal projects.* (1) This Part will become applicable to federal projects, or separately-authorized units thereof, which were authorized for construction but not completed on the effective date of this Part to the same extent that the Principles and Standards Manual of Procedures, issued pursuant to the President's Water Policy Initiatives of July 12, 1978, will be applied to such projects. The Secretary of the Interior may nevertheless determine that this Part will apply to projects otherwise exempt by reason of the foregoing if, after a review of evidence submitted in accordance with paragraph (c)(3) of this section, the Secretary determines that—

(i) Authorized fish and wildlife conservation measures will not be installed or will not substantially compensate for fish and wildlife resource losses caused by the project, and

(ii) The impacts of the project upon wildlife resources are significant, or

(iii) Construction has not proceeded to the point that all options for wildlife conservation are practically foreclosed. Where appropriate, the Secretary of the Interior will consult with the Administrator of NOAA in making this determination.

(2) If this Part becomes applicable to a Federal project in accordance with paragraph (c)(1) of this section, action agencies shall not make any irreversible or irretrievable commitment of resources pending compliance with this Part which would foreclose the consideration or alternatives to compensate for wildlife losses.

(3) Within Ninety (90) days of a written request by the Secretary of the Interior, action agencies will submit the following information to the Secretary of the Interior with respect to each federal project, and separately-authorized federal project unit, which is otherwise exempt by reason of paragraph (c)(1) of this section:

(i) Its location, and the source and date of authorization;

(ii) The state of constuction (if any) and the percentage of current total estimated project cost which has been expended;

(iii) A description of the mitigation and enhancement measures which were authorized and a discussion of any difficulties encountered which could defeat adoption of such measures;

(iv) Where mitigation and enhancement measures may be under consideration for future authorization, an explanation of the status of planning and approval of such proposals within the action agency;

(v) If mitigation or enhancement land acquisition was authorized, a statement of the percentage of the authorized amount which has been acquired;

(vi) A ranking of those projects most in need of Secretarial action under paragraph (c)(1), stating the rationale for such ranking and listing those not under active consideration for construction;

(vii) A statement of whether the project meets one or more of the criteria referred to in paragraph (c)(1) and, if it does, whether the procedure of this Part should nonetheless apply.

(d) *Waivers by States or NMFS.* Where, in the judgment of a Regional Director of NMFS or the head of a state wildlife agency, their involvement in the procedures set forth in Subparts B and C would be inappropriate, he or she may waive those requirements as applied to said agency.

§ 410.13 Comprehensive water resources planning requirements.

With the exception of Level C studies undertaken by federal action agencies, Subpart B will not apply to comprehensive water or related land resources planning requirements. However, § 410.21 does apply to such programs. Wildlife agencies will be involved in such programs as provided in Subpart D.

§ 410.14 Federal programs administered by States.

Subpart B will not apply to projects approved under federal programs administered in whole or in part by States, except as provided pursuant to § 410.41.

§ 410.15 Lead action agencies.

Wildlife agencies will coordinate action compliance with the procedural requirements of §§ 410.22 and 410.23 of this Part through lead action agencies designated in accordance with NEPA regulations [40 CFR 1501.5], or, where not so designated, through an action agency which obtains the concurrence of other action agencies which may have jurisdiction over the project in question to act in that capacity. Notwithstanding such agreement, action agencies must comply with the other requirements of the FWCA and this Part.

§ 410.16 Relation to other environmental review requirements.

(a) Compliance with NEPA and the Principles and Standards of the Water Resources Council are complementary to, but not a substitute for, compliance with the FWCA or these rules. To the maximum extent possible, the reports and recommendations of wildlife agencies will accompany environmental assessments and be incorporated into the draft and final decision document and the draft and final environmental impact statement (EIS), and Principles and Standards analysis.

(b) If a permit is required under sections 103(b), 402, or 404 of the Clean Water Act or section 9 or 10 of the River and Harbor Act of 1899 for projects of, or pending approval before, a federal agency, that agency shall ensure compliance with those permit programs before, or at the same time, approves, seeks authorization of, or seeks construction funding for the project.

(c) Many statutory authorities require consultation with the Departments of the Interior and/or Commerce on the wildlife impacts of federal actions. Federal, state, or private agencies or individuals are encouraged to adopt and employ the procedures or methods prescribed by these rules to obtain the full loss prevention, mitigation, and enhancement potential of projects, whenever authorized.

Subpart B—FWCA Compliance Procedure

§ 410.21 Equal consideration.

Equal consideration of wildlife resource values in project planning and approval is the essence of the FWCA compliance process. It requires action agencies to involve wildlife agencies throughout their planning, approval, and implementation process for a project and highlights the need to utilize a systematic approach to analyzing and establishing planning objectives for wildlife resource needs and problems and developing and evaluating alternative plans. Wildlife resources will be conserved in action agency project planning and approval by minimizing adverse effects, compensating for wildlife resource losses, and enhancing wildlife resource values.

Compliance with the equal consideration mandate requires:

(1) *Consultation* between action agencies (or applicants to them) and wildlife agencies on measures necessary to conserve wildlife in project planning, construction, and operation;

(2) *Reporting* by wildlife agencies on the effects of the project and its alternatives upon wildlife resources and on measures recommended to conserve wildlife resources in connection with the project and its alternatives;

(3) Full *consideration* by the action agencies of measures recommended to conserve wildlife resources, both with regard to the project and its alternatives;

(4) *Implementation* of justifiable conservation measures.

§ 410.22 Consultation.

(a) *Initiation.* The FWCA compliance process may be initiated by a potential applicant, an action agency, or a wildlife agency.

(1) Potential Applicants. Implementing procedures of action agencies shall provide that applicants for those non-federal project approvals enumerated below contain written evidence that they initiated the FWCA compliance process with both Regional Directors and the head of the state wildlife agency exercising administration over the fish and wildlife resources of the state(s) wherein the project is to be constructed. This pre-application procedure applies to projects which—

(i) Involve drainage, dredging, filling, or other modification of wetlands greater than ten acres, create impoundments greater than fifty acres, involve one half mile of dredging or stream channel modification, or

(ii) Require a water-dependent power project approval from the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), or the Rural Electrification Administration (REA). This paragraph also applies to preliminary permit (FERC) and early site review (NRC) applications. The intent of this paragraph (a)(1) of this section is to assist applicants in designing environmentally sound projects without waste of their planning resources and to minimize the potential for delay in the processing of applications. Action agency implementing procedures shall advise that consultation should be initiated by the applicant at the earliest stages of its project planning, and that its submissions to wildlife agencies shall indicate the general work or activity being considered, its purpose(s), and the general area in which it is contemplated. The information provided to wildlife agencies will be specific enough to allow them to identify possible effects on wildlife and to identify potential conservation measures (including alternatives), and yet be general and flexible enough to allow the incorporation of justifiable conservation measures prior to submission of a formal application to the action agency. Wildlife agencies will provide to the potential applicant a brief analysis of potential impacts to wildlife resources, suggested modifications or alternatives, and an indication of which project features, if any, would likely be viewed as being unacceptable at the time of permit or license review. The detail of analysis and refinement of recommendations will be related to the level of detail of the proposed plan. The wildlife agencies shall identify any areas of concern or analysis that require further detail or study. The results of this analysis should be integrated in or accompany the action agency's NEPA environmental assessment.

(2) Action agencies. Notwithstanding any applicant consultation which may be required by paragraph (a)(1) of this section, action agencies shall initiate (or continue) the FWCA compliance process in the following manner:

(i) Federal projects. Action agencies shall notify both Regional Directors and the head of the state wildlife agency (through OMB Circular A-95 procedures, or otherwise) upon initiation of studies or actions which may lead to the authorization of a federal project. This also applies to the initiation of planning for the modification or supplementation of project reports on previously authorized project. See § 410.12(b)(2). Action agencies shall invite wildlife agencies to participate actively throughout the planning process. [For existing Memoranda of Understanding, see App. B and C].

(ii) Federally-approved projects. Appropriate written notice of preliminary permit (FERC) and early site review (NRC) applications, as well as NRC and FERC construction license and permit or renewal applications, will be forwarded for comment to both the Secretaries of the Interior and of Commerce and to the head of the wildlife agency for the state(s) wherein the proposed construction may occur. Appropriate written notice of all other applications to federal agencies for approvals, including renewal applications, shall be forwarded promptly after their receipt to both Regional Directors and to the head of the wildlife agency for the state(s) wherein the proposed construction may occur. The evidence which is required by paragraph (a)(1) of this section shall accompany these notices.

(iii) Emergencies. (A) If a major disaster will be declared by the President under authority of the Disaster Relief Act Amendments of 1974, the designated Federal Coordinating Officer (FCO) of the Federal Emergency Management Agency (FEMA), will consult with the Regional Directors and the affected state wildlife agency to determine the need for FWCA compliance during the course of the emergency. When continuing detailed coordination is determined necessary by wildlife agencies, the FCO will provide facilities for a wildlife agency coordinator(s) at the Disaster Field Office (DFO). Field level coordination will occur between the designated wildlife coordinator(s) and the FEMA Public Assistance Officer (PAO) responsible for the DFO. In the event of unresolved conflicts between the wildlife coordinator(s) and the PAO, the matter will be referred to the Federal Coordinating Officer for resolution.

(B) Procedures for FWCA compliance in other action agency programs or actions in emergency situations will be identified during the period for approval of implementing procedures.

(3) Wildlife agencies. Where FWCA compliance is not initiated where required, it shall be deemed initiated upon notice by a wildlife agency.

(b) *Coordinated planning.* (1) Particularly in the case of federal projects and NRC, FERC, and REA-approved projects, wildlife and action agencies shall utilize a systematic approach in analyzing wildlife resource needs and problems, establishing planning goals therefor, and developing and evaluating alternative resource management plans.

(2) Wildlife agencies will cooperate with action agencies in the development of analyses, recommendations, and reports to action agencies on means and measures for the conservation of wildlife resources.

(3) Action agencies shall provide wildlife agencies adequate opportunity to prepare FWCA reports and recommendations and transmit them to the action agency for timely consideration with NEPA environmental assessments, and for incorporation into the draft EIS and other decision documents.

(4) In the case of federal projects and FERC, NRC, and REA-approved projects, the action agencies shall convene scoping meetings with the wildlife agencies and (where applicable) applicants upon initiation of the FWCA compliance process. Such meeting need

not be convened where consultation has occurred in accordance with paragraph (b)(1) of this section. To the fullest extent possible, these meetings should be combined with the NEPA scoping process where the proposal requires preparation of a draft EIS. 40 CFR 1501.7. Such meetings may also be convened in the case of other applications for approvals at the request of a wildlife agency or the action agency. Such meetings will be for the purposes of—

(i) Developing plans of study which ensure full wildlife agency participation throughout each phase of the planning or approval process,

(ii) Determining who, as among the federal and state agencies or the applicant, will undertake and oversee the required studies and investigations,

(iii) Establishing mutually acceptable target dates for the initiation and completion of studies and the submission of FWCA reports and recommendations,

(iv) Coordinating FWCA compliance with other environmental review requirements,

(v) Ensuring that conservation of wildlife resources is given equal consideration with other study or project purposes or goals, and

(vi) Ensuring that action agencies provide wildlife agencies with adequate descriptions of alternative project plans under consideration. A record of the agreements reached and responsibilities assigned in scoping meetings shall be distributed to the participating parties and included in the administrative record of the action agency. All parties share a responsibility for early and timely exchange of information required for completion of assigned studies, investigations, reports, and recommendations.

§ 410.23 Reporting.

(a) *Authority.* Except in the case of NRC and FERC-licensed projects, the authority to transmit FWCA reports and recommendations of the Secretaries of the Interior and Commerce is exercised by the Regional Directors. In the case of FERC and NRC-approved projects, such authority is exercised for the Secretary of Commerce by the Assistant Administrator for Fisheries, NOAA, and for the Secretary of the Interior by the Assistant Secretary for Polcy, Budget, and Administration, acting upon the recommendation of the FWS and the Office of Environmental Project Review.

(b) *Timing.* Consistent with NEPA regulations [40 CFR 1501.8 and 1502.25], wildlife agencies shall, to the maximum extent possible, forward their reports and recommendations to action agencies within an agreed-upon time frame sufficient to permit preliminary action agency decisions on incorporation of those recommendations into project plans, and to permit their inclusion and analysis in the draft decision document and/or the environmental assessment or draft EIS. See § 410.24(a). To the maximum extent possible, preparation and transmittal of FWCA reports will be coordinated and combined with the preparation and transmittal of reports or other reviews required of the Department of the Interior or National Oceanic and Atmospheric Administration (NOAA) by other federal environmental review requirements, including—

(1) Endangered Species Act of 1973,

(2) Estuary Protection Act,

(3) § 6(a) of the Federal Water Project Recreation Act,

(4) Coastal Zone Management Act,

(5) §§ 103(b), 401, 402, 404, 303, and 208 of the Clean Water Act of 1977,

(6) § 5(d) and 7(b) of the Wild and Scenic Rivers Act.

Memoranda of understanding or agreements which may provide time limits for the referral of FWCA reports and recommendations for certain classes of projects appear in Appendices B and C.

(c) *Content.* (1) Wildlife agencies will prepare reports that describe project-related effects upon wildlife resources and identify alternative means and measures necessary to conserve wildlife resources. Evaluation techniques used in describing effects and identifying conservation measures will be directed at quantifying and qualifying potential effects upon wildlife, their habitat and its productivity and related values.

(2) Wildlife agencies shall prepare and submit reports to action agencies that describe—

(i) Wildlife problems and needs and recommended fish and wildlife planning goals,

(ii) The positive and negative effects and impacts of alternative project plans upon wildlife and recommended conservation features,

(iii) The positive and negative effects and impacts of the construction and operation of the selected plan upon wildlife, the conservation measures identified during plan formulation, and specific recommendations for conservation measures that should be included in the selected plan,

(iv) The results and impacts expected from implementing these recommendations, and

(v) The plan, if any, which they prefer from the standpoint of wildlife conservation.

(3) Wildlife agency reports on federal projects shall include an analysis of the extent of wildlife resource productivity lost to, or gained with, the proposed project and of the conservaton measures required to replace that loss (if that is possible), measured without reference to values attributed to human use ("user-day") or other monetary computations. This analysis may be provided for non-federal projects and for alternative project plans.

(4) FWCA reports and recommendations will contain a review of the disposition of wildlife agency recommendations previously made.

(5) If features of project design, construction, or operation are not sufficiently developed that their effects can be properly assessed, the report of the wildlife agencies will so state and will list the areas requiring further study to identify necessary conservation measures. Any consultation or coordination necessary in the implementation of conservation measures will be identified.

(6) When analyzing project effects and impacts, wildlife agencies will take into account other water-related project planning and review requirements, such as: Executive Orders 11988 (floodplains) and 11990 (wetlands); § 73 of the Water Resources Development Act of 1974 (non-structural alternatives); Indian trust environmental review requirements; the Marine Protection, Research, and Sanctuaries Act of 1972; § 102(b) of the Clean Water Act; federal water policy; the potential effects of the proposed project upon federal property and public trust interests, including reserved water rights.

(d) *Public participation.* Where significant wildlife resource issues are involved, wildlife agencies will invite public participation in the process of developing FWCA reports and recommendations in accordance with guidelines which they develop.

(e) *Inability to report.* If a wildlife agency is unable to prepare an FWCA report or otherwise participate in the planning or approval process, it shall notify the action agency within 30 days of the receipt of an action agency's request to initiate consultation, detailing the reasons therefor. Such notification does not relieve action agencies of the requirements of the FWCA or §§ 410.21 and 410.24 of this Subpart.

(f) *Follow-through.* Once wildlife agency reports are sent to action agencies, all wildlife agenceis should actively pursue such means as will ensure that necessary studies and recommended measures are undertaken and implemented.

§ 410.24 Consideration.

(a) *Action agency findings.* (1) The reporting officer shall prepare for the administrative record (project plan or planning report, where applicable) written findings on which of the measures recommended by wildlife agencies with respect to the selected project plan and its alternatives are and are not believed to be justified, and why. This documentation will include:

(i) A summation of measures adopted during plan formulation to prevent and compensate for wildlife resource losses;

(ii) In the case of federal projects, a finding whether the selected plan fully compensates for losses to wildlife resource productivity, measured in terms of equivalent wildlife resource productivity;

(iii) The justification for tradeoffs made between wildlife conservation and other project features in arriving at the selected plan;

(iv) An identification of any issues of disagreement remaining between the action agency and the wildlife agencies.

(2) In addition to the matter required for federal projects by § 2(f) of the FWCA (16 U.S.C. 662(f)), the reporting officer on federal projects and projects pending consideration by NRC and FERC, shall analyze and discuss the acquisition, operation, maintenance, replacement, and management costs, and the environmental impacts, of wildlife conservation measures proposed by each wildlife agency for each alternative treated in the draft and final environmental impact statement, in benefit-cost analyses of alternatives, and (where applicable) in the evaluation accounts of the Principles and Standards of the Water Resources Council. The reporting officer shall also treat uncompensated damages to fish and wildlife resources as a cost chargeable to the project. All such costs (monetary and non-monetary) shall be estimated over the life of the project, regardless of whether the U.S. Treasury or non-federal parties will bear them.

(3) In making the findings required by paragraphs (a)(1) and (a)(2) of this section, the reporting officer and each higher action agency decision-making authority shall use the criteria established in paragraph (b) of this section.

(4) Where the findings required by paragraphs (a)(1) and (a)(2) of this section have not been disclosed in a draft EIS, in publicly circulated planning document, or in public or adjudicatory hearings, the reporting officer shall publish those findings in the **Federal Register** or other appropriate media and afford the public reasonable opportunity to present its views. In the case of FERC and NRC-approved projects, opportunities for administrative or court review of the findings of action agency initial or final decision-makers will not be considered compliance with this paragraph.

(5) The reporting officer shall transmit the information required by paragraphs (a)(1) through (a)(4) to counterpart officials in the wildlife agency(ies) concerned for an agreed-upon period of time for comment prior to final agency action on the matter. If there are differences at this stage between a wildlife agency and the action agency on the reporting officer's disposition of wildlife agency recommendations, the wildlife agency may request the action agency to hold a public hearing on the matter. Action agency implementing procedures shall require an ensuing reconsideration of the matter and, if such hearings are deemed appropriate by the action agency, full consideration of information generated by such public hearings. Differences not resolved in this manner shall be made a matter of record and, if requested by either the action or wildlife agency, promptly referred to successively higher authority of both agencies for resolution. Where memoranda of understanding or agreement do not already so provide [see App. B and C], implementing procedures shall provide a means of complying with this paragraph.

(6) If, despite best efforts, wildlife agencies cannot identify loss prevention, mitigation, and enhancement measures in detail prior to project authorization or approval, action agencies shall include in their recommendations to higher authorities the requirements necessary to ensure that, once identified and described, these measures will be proposed for authorization or approval and, if authorized and funded or approved, will be implemented. Action agencies should avoid committing resources which foreclose adoption of alternative wildlife conservation measures.

(b) *Decision criteria.* (1) Action agencies are required to make findings on wildlife conservation measures which they deem justified to be included in projects to obtain maximum overall project benefits to the public. Action agencies must regard wildlife conservation as a programmatic and project purpose or goal equal to other project purposes or goals. Certain project benefits may be diminished to obtain these conservation goals. Findings directed at loss prevention and mitigation measures shall be made using assessment and evaluation techniques based upon wildlife habitat values. Monetary values may be displayed and used in measuring the cost-effectiveness of alternative mitigation plans, but shall not be used for justification purposes. Enhancement measures may be evaluated using other techniques, but should be measured using habitat-based techniques, where possible. Such findings shall be made with the objectives of both preventing and compensating for wildlife resource losses, and of enhancing wildlife resource values. To the extent practicable and justifiable, action agencies shall ameliorate project-related losses to wildlife resources, wherever they occur. With the exception of the enhancement component, wildlife resource conservation measures do not create benefits for the purposes of benefit-cost analysis; they are to be considered as avoiding or abating costs (losses) to existing resources and values.

(2) Action agencies may not reject recommended wildlife conservation measures for federal projects on the grounds that wildlife conservation is not a "purpose" for which a federal project was or can be authorized, or on the grounds that they are not authorized to so condition a non-federal project approval. The FWCA amends the organic authorities of action agencies to provide these authorities. In the case of federal projects undertaken by the Department of the Interior, the Fish and Wildlife Act of 1956, 70 Stat. 1122 (16 U.S.C. 742f(4)–(5) (1976)), supplements such authority.

(3) Action agencies must justify the adoption or rejection of means and measures for wildlife resource conservation using substantive economic, envirnomental, and social reasons. Measures recommended by wildlife agencies for compensation of wildlife resource losses cannot be considered unjustified because—

(i) That agency or other agencies may not have adopted a habitat-based wildlife impact assessment and evaluation procedure,

(ii) Those measures, either alone or collectively, do not have a favorable monetary benefit-cost ratio,

(iii) Project beneficiaries or other non-federal entities are unwilling to fund the appropriate share of increased federal project costs necessary to compensate for wildlife resource losses,

(iv) There are other proposed uses for land or waters recommended for wildlife compensation purposes, unless their proposed use is found to be more in the public interest than the proposed mitigation, or

(v) Recommended wildlife resource properties or compensation measures are outside the immediate project boundaries.

(4) If an action agency finds that a measure recommended by wildlife agencies for compensation of wildlife resource losses is not justifiable because it would render the monetary benefit-cost ratio of the project unfavorable or because project beneficiaries or other non-federal entities are unable to fund the appropriate share of increased federal project costs necessary to mitigate/compensate for the wildlife resource losses involved, the action agency shall explain in detail, in terms of obtaining maximum overall project benefits, its reasons for so finding.

(5) Justifiable means and measures for wildlife resource conservation shall be incorporated as conditions or stipulations in action agency approvals where the practical effect of not doing so is that the means and measures will not be adopted.

(c) *Requests for project authorization.* The reports, recommendations, and findings required by §§ 410.23 and 410.24 shall be made an integral part of (1) action agency reports submitted to the Office of Management and Budget and the Congress in connection with a construction authorization proposal, and (2) submission to action agency final decision-maker(s) of recommendations on projects they may approve or authorize.

Subpart C—Project Implementation

§ 410.31 Congressional liaison.

Wildlife agencies will make themselves available to testify in authorization and appropriations committee hearings concerning proposals for Congressional authorization or funding of wildlife conservation measures.

§ 410.32 General plans for management of wildlife resource properties.

A General Plan is a document that designates the lands which are to become transferred for wildlife resource management properties and generally describes the use of such properties for wildlife management purposes. The objective of General Plans is to ensure a realization of the wildlife resource conservation measures which formed a basis for the justification and authorization of the project. The FWCA requires the execution of a General Plan prior to action agency transfer of administrative or legislative jurisdiction over the area to the agency which will administer the area for wildlife purposes.

(a) *The determination of which agency shall manage the wildlife resource properties.* (1) Properties with migratory bird values. After investigation, the Secretary of the Interior will determine whether wildlife resource properties have value in carrying out the national migratory bird program. When the Secretary concludes that the properties have such value, the Department of the Interior may administer the lands directly, or in accordance with a cooperative agreement with the appropriate state wildlife agency. The Secretary may manage such properties through another public or private agency or organization. The action agency shall make such wildlife resource properties available, without cost, for administration to—

(i) The Secretary of the Interior, when the Department of the Interior will be responsible for administering the property either directly, or through cooperation with a public or private agency or organization, or

(ii) The state wildlife agency, if it is jointly determined by the Secretary of the Interior and such state wildlife agency that state administration of those wildlife resources would be in the public interest.

(2) *Other properties.* When the Secretary concludes that the wildlife resource properties have value other than for migratory bird management, the state wildlife agency shall be afforded the opportunity to assume management of the lands.

(3) *Interim administration.* During the period after the action agency has acquired the wildlife resource properties and before the joint approval of the General Plan, wildlife resource properties shall be made available upon request and without cost to the FWS for interim administration of the property for wildlife resource conservation purposes. The FWS and the state wildlife agency may agree which agency shall assume interim administrative responsibility. If for any reason, the state wildlife agency cannot assume or continue the administration of wildlife resource properties, the FWS shall be afforded the opportunity to assume administration of such property for wildlife resource purposes on an interim basis, or to enter into cooperative arrangements with the action agency whereby that agency shall administer such property for wildlife resource purposes.

(b) *NEPA compliance.* Action agencies are responsible for NEPA compliance respecting General Plans. Where possible, the information referred to in subsection (d) of this section should appear in the project EIS.

(c) *Development and approval of general plans.* (1) After consultation with the state wildlife agency, the Regional Director of NMFS, the action agency and (if different) the agency exercising primary jurisdiction over the area ("primary jurisdiction agency"), the FWS will initiate the development of a preliminary draft of a general plan for the management of the wildlife resources of wildlife resource properties. In cases where the area in question will likely be managed by a State, the FWS will request the state wildlife agency to prepare the draft. The major features of the draft shall be based on the wildlife agencies' reports and recommendations which are required by section 2(b) of the FWCA and these rules. The draft shall be submitted concurrently to the wildlife agencies, the action agency, and (if different) the primary jurisdiction agency, for their review and responsive recommendations.

(2) Any differences between the action and/or primary jurisdiction agency and the FWS on the proposed General Plan that cannot be resolved by staff shall be resolved by—

(i) The Secretary of the Interior, when the said agency is an agency in the Department of the Interior, or

(ii) The Secretary of the Interior, in consultation with the head of any other department or agency of which the action or primary jurisdiction agency may be a part.

(3) Any differences over the content of the proposed General Plan between FWS and state wildlife agency that cannot be resolved by them will be resolved by the Governor of the affected state and the Secretary of the Interior.

(4) General plans shall be approved at the same time as the document which transfers administration of the lands from the primary jurisdiction agency to the agency or organization designated in accordance with paragraph (a) of this section. The General Plan shall be approved or modified jointly by—

(i) The head of the agency exercising primary jurisdiction over the area,

(ii) The Secretary of the Interior, and

(iii) The head of the wildlife agency of the state wherein the proposed project may be or is constructed.

(5) Where the FWS and NMFS agree that wildlife resources of interest to NMFS would be substantially affected by management of the wildlife resource property which is the subject of the

General Plan, the responsibilities assigned to Interior officials by paragraphs (c)(2) through (c)(4) of this section shall be performed jointly by the appropriate official of NOAA and Interior.

(d) *Content of a general plan.* A General Plan shall: (1) Describe the uses of the wildlife resource property by generally detailing—

(i) The wildlife management goals for the area, as discussed in the project EIS (where applicable),

(ii) The principal species and habitats to be managed,

(iii) The general management concepts and practices to be employed,

(iv) The wildlife development, facilities, or other features to be constructed,

(v) Any restrictions on use of the wildlife resource properties, and

(vi) The availability of the land for public access;

(2) Designate the agency or organization responsible for the administration of the wildlife resource properties, as governed by the provisions of paragraph (a) of this section;

(3) Describe the boundaries and location of the wildlife resource management properties;

(4) Identify capital, operation, maintainence and replacement costs;

(5) Contain provisions for continued consultation between the agency administering the property for wildlife purposes and the primary jurisdiction agency to coordinate wildlife resource management with the management of the project.

(e) *Funding and reports.* Funds for operation, maintainence, management, and replacement of wildlife resource properties acquired or made available for compensation of project-related wildlife resources losses shall be computed by the administering agency and included in the annual budget submissions of action agencies. Together with other project features adopted for compensation of wildlife resource losses, these costs are integral project costs. Any agency administering wildlife resource properties may be requested to prepare annual reports to action and federal wildlife agencies demonstrating how authorized wildlife conservation measures and the General Plan are being implemented and how compensation and enhancement is being achieved.

§ 410.33 Study or modification of authorized federal projects.

If it is decided to undertake post-authorization wildlife resource studies of Federal projects, they should be made either by wildlife agencies, or by others after consultation with wildlife agencies. Post-authorization studies should determine the need for added wildlife conservation measures. In addition to the monitoring provided for in NEPA regulations [40 CFR 1505.3], post-construction studies should evaluate the impact of any non-implementation of measures recommended by wildlife agencies, as well as the effectiveness of implemented measures.

All reports, findings, and determinations resulting from such studies shall be incorporated into any reports on modification or supplementation of plans for previously-authorized projects and employed in complying with the FWCA and these rules. See § 410.11(b).

Subpart D—Implementation of This Part

§ 410.41 Action agency implementing procedures.

(a) Within three months of the publication (not effective) date of these rules, action agencies shall propose to the Secretary of the Interior procedures which would implement this Part. Action agencies will first identify in that proposal the typical classes of projects of, or approved by, them which are referred to in paragraphs 410.11 (a) through (c) and § 410.14 of Subpart A, and in § 410.22(a)(2)(iii) of Subpart B. For each class of projects so identified, action agencies shall provide responses to the following:

(1) What are the statutory and U.S. Code citations under which authority the class of projects may be authorized;

(2) Do existing procedures already satisfy the following provisions of this Part (if so, give specific CFR or other citations to appropriate sections of action agency procedures), particularly—

(i) Section 410.3 ("Regional Directors," "reporting officer" and "wildlife agency") and § 410.22(a)(2)—routing of consultation requests, and

(ii) Section 410.11(c) and § 410.16(b)—coordination with the Clean Water Act and River and Harbor Act permit programs.

(3) Does the law applicable to the action agency positively bar the adoption of any requirement of this Part applicable to a class in question;

(4) What implementing procedures are required to put into effect the provisions set forth in paragraph (a)(2);

(5) How would this be accomplished—by codified regulation, by a public proceeding, or by other instructions—and what time delay is required by procedural preconditions to their adoption;

(6) If any applicable provisions of this Part are believed to be inappropriate for a class of projects, are there reasons why such classes should be exempt, or is there an alternative which satisfies the substance and intent of the provisions?

(b) In consultation with the Administrator of NOAA and the head of the federal agency in question, the Secretary of the Interior will resolve any differences on interpretation and applicability of this Part which may arise and cannot be resolved by staff during the process of approval of implementing procedures.

(c) The Secretary will approve acceptable implementing procedures which are proposed in accordance with paragraph 410.41(a) within one hundred fifty (150) days of the publication date of this Part.

§ 410.42 Comprehensive planning requirements.

Within three months of the publication date of these rules, action agencies will review the comprehensive water and related land resources and water quality planning programs administered by them to determine what level(s) of wildlife agency involvement therein are presently provided for by written action agency procedures. Action agencies will report such determinations to the Secretary of the Interior and, if necessary, propose to the Secretary new coordination procedures for wildlife agency involvement in such programs, including (but not limited to) those authorized by, or referred to as—

(a) Water Resources Planning Act of 1965,

(b) Sections 201, 208, 303, and 314 of the Clean Water Act of 1977,

(c) Type IV studies of the Soil Conservation Service,

(d) Coastal Zone Management Act of 1972,

(e) Federal Land Policy and Management Act,

(f) Land and Water Conservation Fund Act,

(g) Wild and Scenic Rivers Act,

(h) Resource Conservation and Development Act,

(i) Forest and Renewable Resources Planning Act of 1974,

(j) Urban Studies of the Corps of Engineers,

(k) National Forest Management Planning Act of 1976,

(l) Soil and Water Resource Conservation Act of 1977,

(m) Surface Mining Control and Reclamation Act.

(n) Outer Continental Shelf Lands Act.

Appendix A. Regional Directors, Fish and Wildlife Service

Region I

U.S. Fish and Wildlife Service, Lloyd 500
Building, Suite 1692, 500 N.E. Multnomah
Street, Portland, Oregon 97232.

Region II

U.S. Fish and Wildlife Service, 500 Gold
Avenue, S.W., P.O. Box 1306, Albuquerque,
New Mexico 87103.

Region III

U.S. Fish and Wildlife Service, Federal
Building, Fort Snelling, Twin Cities, MN
55111.

Region IV

U.S. Fish and Wildlife Service, 17 Executive
Park Drive, N.E., P.O. Box 95067, Atlanta,
Georgia 30347.

Region V

U.S. Fish and Wildlife Service, One Gateway
Center, Suite 700, Newton Corner,
Massachusetts 02158.

Region VI

U.S. Fish and Wildlife Service, P.O. Box
25486, 134 Union Boulevard, Lakewood,
Colo. 80228.

Alaska Area Office

U.S. Fish and Wildlife Service, 1011 East
Tudor Road, Anchorage, Alaska 99503.

Regional Directors, National Marine Fisheries Service

Regional Director, National Marine Fisheries
Service, Northeast Region, Federal
Building, 181 Main Street, Gloucester,
Massachusetts 01930.

Regional Director, National Marine Fisheries
Service, Southeast Region, Duval Building,
9450 Gandy Boulevard, St. Petersburg,
Florida 33702.

Regional Director, National Marine Fisheries
Service, Northwest Region, 1700 Westlake
Avenue, North, Seattle, Washington 98109.

Regional Director, National Marine Fisheries
Service, Southwest Region, 300 South Ferry
Street, Terminal Island, California 90731.

Regional Director, National Marine Fisheries
Service, Alaska Region, P.O. Box 1668,
Juneau, Alaska 99801.

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TAB H
WILD AND SCENIC RIVERS

62. Wild and Scenic Rivers Act

16 U.S.C. 1271–1287

Sec.
1271. Congressional declaration of policy.
1272. Congressional declaration of purpose.
1273. National wild and scenic rivers system; Congressional authorization for inclusion; designation by State legislatures; permanent administration by States; application for inclusion by Governors; satisfaction of criteria; eligibility for inclusion.
1274. Component rivers and adjacent lands; establishment of boundaries; classification; development plans.
1275. Additions to the national wild and scenic rivers system.
  (a) Proposals by Secretaries of Interior and Agriculture; administration by the United States; coordination; report.
  (b) Study of report by affected Federal and State officials; recommendations and comments; transmittal to the President and Congress.
  (c) Publication in Federal Register.
1276. Rivers constituting potential additions to the national wild and scenic rivers system.
  (a) Enumeration of designated rivers.
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§ 1271. Congressional declaration of policy.

It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. The Congress declares that the established national policy of dam and other construction at appropriate sections of the rivers of the United States needs to be complemented by a policy that would preserve other selected rivers or sections thereof in their free-flowing condition to protect the water quality of such rivers and to fulfill other vital national conservation purposes. (Pub. L. 90–542, § 1(b), Oct. 2, 1968, 82 Stat. 906.)

§ 1272. Congressional declaration of purpose.

The purpose of this chapter is to implement the policy set out in section 1271 of this title by instituting a national wild and scenic rivers system, by designating the initial components of that system, and by prescribing the methods by which and standards according to which additional components may be added to the system from time to time. (Pub. L. 90–542, § 1(c), Oct. 2, 1968, 82 Stat. 906.)

§ 1273. National wild and scenic rivers system; Congressional authorization for inclusion; designation by State legislatures; permanent administration by States; application for inclusion by Governors; satisfaction of criteria; eligibility for inclusion.

(a) The national wild and scenic rivers system shall comprise rivers (i) that are authorized for inclusion therein by Act of Congress, or (ii) that are designated as wild, scenic or recreational rivers by or pursuant to an act of the legislature of the State or States through which they flow, that are to be permanently administered as wild, scenic or recreational rivers by an agency or political subdivision of the State or States concerned without expense to the United States, that are found by the Secretary of the Interior, upon application of the Governor of the State or the Governors of the States concerned, or a person or persons thereunto duly appointed by him or them, to meet the criteria established in this chapter and such criteria supplementary thereto as he may prescribe, and that are approved by him for inclusion in the system, including, upon application of the Governor of the State concerned, the Allagash Wilderness Waterway, Maine; that segment of the Wolf River, Wisconsin, which flows through Langlade County; and that segment of the New River in North Carolina extending from its confluence with Dog Creek downstream approximately 26.5 miles to the Virginia State line.

(b) A wild, scenic or recreational river area eligible to be included in the system is a free-flowing stream and the related adjacent land area that possesses one or more of the values referred to in section 1271 of this title. Every wild, scenic or recreational river in its free-flowing condition, or upon restoration to this condition, shall be considered eligible for inclusion in the national wild and scenic rivers system and, if included, shall be classified, designated, and administered as one of the following:

(1) Wild river areas—Those rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America.

(2) Scenic river areas—Those rivers or sections of rivers that are free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads.

(3) Recreational river areas—Those rivers or sections of rivers that are readily accessible by road or railroad, that may have some development along their shorelines, and that may have undergone some impoundment or diversion in the past.

(Pub. L. 90–542, § 2, Oct. 2, 1968, 82 Stat. 906.)

§ 1274. Component rivers and adjacent lands; establishment of boundaries; classification; development plans.

(a) The following rivers and the land adjacent thereto are hereby designated as components of the national wild and scenic rivers system:

(1) Clearwater, Middle Fork, Idaho.—The Middle Fork from the town of Kooskia upstream to the town of Lowell; the Lochsa River from its junction with the Selway at Lowell forming the Middle Fork, upstream to the Powell Ranger Station; and the Selway River from Lowell upstream to its origin; to be administered by the Secretary of Agriculture.

(2) Eleventh Point, Missouri.—The segment of the river extending downstream from Thomasville to State Highway 142; to be administered by the Secretary of Agriculture.

(3) Feather, California.—The entire Middle Fork downstream from the confluence of its tributary streams one kilometer south of Beckworth, California; to be administered by the Secretary of Agriculture.

(4) Rio Grande, New Mexico.—The segment extending from the Colorado State line downstream to the State Highway 96 crossing, and the lower four miles of the Red River; to be administered by the Secretary of the Interior.

(5) Rogue, Oregon.—The segment of the river extending from the mouth of the Applegate River downstream to the Lobster Creek Bridge; to be administered by agencies of the Departments of the Interior or Agriculture as agreed upon by the Secretaries of said Departments or as directed by the President.

(6) Saint Croix, Minnesota and Wisconsin.—The segment between the dam near Taylors Falls, Minnesota, and the dam near Gordon, Wisconsin, and its tributary, the Namekago, from Lake Namekago dowstream to its confluence with the Saint Croix; to be administered by the Secretary of the Interior: *Provided*, That except as may be required in connection with items (a) and (b) of this paragraph, no funds available to carry out the provisions of this chapter may be expended for the acquisition or development of lands in connection with, or for administration under this chapter of, that portion of the Saint Croix River between the dam near Taylors Falls, Minnesota, and the upstream end of Big Island in Wisconsin, until sixty days after the date on which the Secretary has transmitted to the President of the Senate and Speaker of the House of Representatives a proposed cooperative agreement between the Northern States Power Company and the United States (a) whereby the company agrees to convey to the United States, without charge, appropriate interests in certain of its lands between the dam near Taylors Falls, Minnesota, and the upstream end of Big Island in Wisconsin, including the company's right, title, and interest to approximately one hundred acres per mile, and (b) providing for the use and development of other lands and interests in land retained by the company between said points adjacent to the river in a manner which shall complement and not be inconsistent with the purposes for which the lands and interests in land donated by the company are administered under this chapter. Said agreement may also include provision for State or local governmental participation as authorized under subsection (e) of section 1281 of this title.

(7) Salmon, Middle Fork, Idaho.—From its origin to its confluence with the main Salmon River; to be administered by the Secretary of Agriculture.

(8) Wolf, Wisconsin.—From the Langlade-Menominee County line downstream to Keshena Falls; to be administered by the Secretary of the Interior.

(9) Lower Saint Croix, Minnesota and Wisconsin.—The segment between the dam near Taylors Falls and its confluence with the Mississippi River: *Provided*, (i) That the upper twenty-seven miles of this river segment shall be administered by the Secretary of the Interior; and (ii) That the lower twenty-five miles shall be designated by the Secretary upon his approval of an application for such designation made by the Governors of the State of Minnesota and Wisconsin.

(10) Chattooga, North Carolina, South Carolina, Georgia.—The Segment from 0.8 mile below Cashiers Lake in North Carolina to Tugaloo Reservoir, and the West Fork Chattooga River from its junction with Chattooga upstream 7.3 miles, as generally depicted on the boundary map entitled "Proposed Wild and Scenic Chattooga River and Corridor Boundary", dated August 1973; to be administered by the Secretary of Agriculture: *Provided*, That the Secretary of Agriculture shall take such action as is provided for under subsection (b) of this section within one year from May 10, 1974: *Provided further*, That for the purposes of this river, there are authorized to be appropriated not more than $2,000,000 for the acquisition of lands and interests in lands and not more than $809,000 for development.

(11) Rapid River, Idaho.—The segment from the headwaters of the main stem to the national forest boundary and the segment of the West Fork from the wilderness boundary downstream to the confluence with the main stem, as a wild river.

(12) Snake, Idaho and Oregon.—The segment from Hells Canyon Dam downstream to Pittsburgh Landing, as a wild river; and the segment from Pittsburgh Landing downstream to an eastward extension of the north boundary of section 1, township 5 north, range 47 east, Willamette meridian, as a scenic river.

(13) Flathead, Montana.—The North Fork from the Canadian border downstream to its confluence with the Middle Fork; the Middle Fork from its headwaters to its confluence to the South Fork; and the South Fork from its origin to the Hungry Horse reservoir, as generally depicted on the map entitled "Proposed Flathead Wild and Scenic River Boundary Location" dated February 1976; to be administered by agencies of the Departments of the Interior and Agriculture as agreed upon by the Secretaries of such Departments or as directed by the President. Action required to be taken under subsection (b) of this section shall be taken within one year from the date of enactment of this paragraph. For the purposes of this river, there are authorized to be appropriated not more than $6,719,000 for the acquisition of lands and interests in lands. No funds authorized to be appropriated pursuant to this paragraph shall be available prior to October 1, 1977.

(14) Missouri, Montana.—The segment from Fort Benton one hundred and forty-nine miles downstream to Robinson Bridge, as generally depicted on the boundary map entitled "Missouri Breaks Freeflowing River Proposal", dated October 1975, to be administered by the Secretary of the Interior. For the purposes of this river, there are authorized to be appropriated not more than $1,800,000 for the acquisition of lands and interests in lands. No funds authorized to be appropriated pursuant to this paragraph shall be available prior to October 1, 1977.

(15) Obed, Tennessee.—The segment from the western edge of the Catoosa Wildlife Management Area to the confluence with the Emory River; Clear Creek from the Morgan County line to the confluence with the Obed River, Daddys Creek from the Morgan County line to the confluence with the Obed River; and the Emory River from the confluence with the Obed River to the Nemo bridge as generally depicted and classified on the stream classification map dated December 1973. The Secre-

tary of the Interior shall take such action, with the participation of the State of Tennessee as is provided for under subsection (b) within one year following the date of enactment of this paragraph. The development plan required by such subsection (b) shall include cooperative agreements between the State of Tennessee acting through the Wildlife Resources Agency and the Secretary of the Interior. Lands within the Wild and Scenic River boundaries that are currently part of the Catoosa Wildlife Management Area shall continue to be owned and managed by the Tennessee Wildlife Resources Agency in such a way as to protect the wildlife resources and primitive character of the area, and without further development of roads, campsites, or associated recreational facilities unless deemed necessary by that agency for wildlife management practices. The Obed Wild and Scenic River shall be managed by the Secretary of the Interior. For the purposes of carrying out the provisions of this Act with respect to this river, there are authorized to be appropriated such sums as may be necessary, but not to exceed $2,000,000 for the acquisition of lands or interests in lands and not to exceed $400,000 for development. No funds authorized to be appropriated pursuant to this paragraph shall be available prior to October 1, 1977.

(b) The agency charged with the administration of each component of the national wild and scenic rivers system designated by subsection (a) of this section shall, within one year from October 2, 1968, establish detailed boundaries therefor (which boundaries shall include an average of not more than three hundred and twenty acres per mile on both sides of the river); determine which of the classes outlined in section 1273(b) of this title best fit the river or its various segments; and prepare a plan for necessary developments in connection with its administration in accordance with such classification. Said boundaries, classification, and development plans shall be published in the Federal Register and shall not become effective until ninety days after they have been forwarded to the President of the Senate and the Speaker of the House of Representatives. (Pub. L. 90–542, § 3, Oct. 2, 1968, 82 Stat. 907.)

(As amended Pub. L. 92–560, § 2, Oct. 15, 1972, 86 Stat. 1174; Pub. L. 93–279, § 1(a), May 10, 1974, 88 Stat. 122; Pub. L. 94–199, § 3(a), Dec. 31, 1975, 89 Stat. 1117; Pub. L. 94–486, §§ 101, 201, 301, 601, Oct. 12, 1976, 90 Stat. 2327.

AMENDMENTS

1976—Sections 101, 201, 301, Pub. L. 94–486 added paragraphs 13, 14, and 15, respectively. Sec. 601 amended par. (a)(3).

1975—Subsecs. (a)(11), (12). Pub. L. 94–199 added subsecs. (a)(11) and (12).

1974—Subsec. (a)(10). Pub. L. 93-279 added par. (10).

1972—Subsec. (a)(9). Pub. L. 92-560 added par. (9).

SHORT TITLE

Section 1 of Pub. L. 92–560 provided: "That this Act [which enacted subsec. (a)(9) of this section and provisions set out as notes under this section] may be cited as the 'Lower Saint Croix River Act of 1972'."

ADMINISTRATION OF SNAKE RIVER AND RAPID RIVER AREAS

Section 3(b) of Pub. L. 94–199 provided that: "The segments of the Snake River and the Rapid River designated as wild or scenic river areas by this Act [sections 460gg to 460gg–13 of this title] shall be administered by the Secretary in accordance with the provisions of the Wild and Scenic Rivers Act (82 Stat. 906), as amended [section 1271 et seq. of this title] and the Secretary shall establish detailed boundaries of the Snake River segments thereof in accordance with subsection 3(b) of that Act [subsec. (b) of this section]: *Provided*, That the Secretary shall establish a corridor along the segments of the Rapid River and may not undertake or permit to be undertaken any activities on adjacent public lands which would impair the water quality of the Rapid River segment: *Provided further*, That the Secretary is authorized to make such minor boundary revisions in the corridors as he deems necessary for the provision of such facilities as are permitted under the applicable provisions of the Wild and Scenic Rivers Act (82 Stat. 906)."

LOWER SAINT CROIX, MINNESOTA AND WISCONSIN

Section 3 of Pub. L. 92–560 provided that: "The Secretary of the Interior shall, within one year following the date of enactment of this Act [Oct. 25, 1972], take with respect to the Lower Saint Croix River segment, such actions as is provided for under section 3(b) of the Wild and Scenic Rivers Act [subsec. (b) of this section]: *Provided*, That (a) the action required by such section shall be undertaken jointly by the Secretary and the appropriate agencies of the affected States; (b) the development plan required by such section shall be construed to be a comprehensive master plan which shall include, but not be limited to, a determination of the lands, waters, and interests therein to be acquired, developed, and administered by the agencies or political subdivisions of the affected States; and (c) such development plan shall provide for State administration of the lower twenty-five miles of the Lower Saint Croix River segment and for continued administration by the States of Minnesota and Wisconsin of such State parks and fish hatcheries as now lie within the twenty-seven-mile segment to be administered by the Secretary of the Interior."

LAND ACQUISITION

Section 4 of Pub. L. 92–560 provided that: "Notwithstanding any provision of the Wild and Scenic Rivers Act [this chapter] which limits acquisition authority within a river segment to be administered by a Federal agency, the States of Minnesota and Wisconsin may acquire within the twenty-seven-mile segment of the Lower Saint Croix River segment to be administered by the Secretary of the Interior such lands as may be proposed for their acquisition, development, operation, and maintenance pursuant to the development plan required by section 3 of this Act [this section]."

NAVIGATION AIDS

Section 5 of Pub. L. 92–560 provided that: "Nothing in this Act [see Short Title note hereunder] shall be deemed to impair or otherwise affect such statutory authority as may be vested in the Secretary of the Department in which the Coast Guard is operating or the Secretary of the Army for the maintenance of navigation aids and navigation improvements."

AUTHORIZATION OF APPROPRIATIONS; LIMITATION

Section 6 of Pub. L. 92–560, as amended by Pub. L. 93–621, § 2, Jan. 3, 1975, 88 Stat. 2096, provided that:

"(a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act [see Short Title note hereunder], but not to exceed $19,000,000 for the acquisition and development of lands and interests therein within the boundaries of the twenty-seven-mile segment of the Lower Saint Croix River segment to be administered by the Secretary of the Interior.

"(b) No funds otherwise authorized to be appropriated by this section shall be expended by the Secretary of the Interior until he has determined that the States of Minnesota and Wisconsin have initiated such land acquisition and development as may be proposed pursuant to the development plan required by section 3 of this Act [this section], and in no event shall the Secretary of the Interior expend more than $2,550,000 of the funds authorized to be appropriated by this section in the first fiscal year following completion of the development plan required by section 3 of this Act [this section]. The balance of funds authorized to be appropriated by this section shall be expended by the Secretary of the Interior at such times as he finds that the States of Minnesota and Wisconsin have made satisfactory progress in their implementation of the development plan required by section 3 of this Act."

Public Law 94-486 contained the following provisions:

"SEC. 202. After consultation with the State and local governments and the interested public, the Secretary shall, pursuant to section 3(b) of the Wild and Scenic Rivers Act and within one year of enactment of this Act—

"(1) establish detailed boundaries of the river segment designated as a component of the National Wild and Scenic Rivers System pursuant to section 1 of this Act (hereinafter referred to as the "river area"): *Provided*, That the boundaries of the portion of the river area from Fort Benton to Coal Banks Landing and the portion of the river area within the boundaries of the Charles M. Russell National Wildlife Range shall be drawn to include only the river and its bed and exclude all adjacent land except significant historic sites and such campsites and access points as are deemed necessary by the Secretary, and to which the Secretary finds no reasonable alternative as set forth in the management plan required pursuant to clause (2) of this section; and

"(2) determine, in accordance with the guidelines in section 2(b) of the Wild and Scenic Rivers Act, which of the three classes—wild river, scenic river, or recreation river—best fit portions of the river segment, designate such portions in such classes, and prepare a management plan for the river area in accordance with such designation.

"SEC. 203. (a) The Secretary of the Interior (hereinafter referred to as the "Secretary") shall manage the river area pursuant to the provisions of this Act and the Wild and Scenic Rivers Act, and in accordance with the provisions of the Taylor Grazing Act (48 Stat. 1269), as amended (43 U.S.C. 315), under principles of multiple use and sustained yield, and with any other authorities available to him for the management and conservation of natural resources and the protection and enhancement of the environment, where such Act, principles, and authorities are consistent with the purposes and provisions of this Act and the Wild and Scenic Rivers Act.

"(b)(1) The Secretary may acquire land and interests in land only in accordance with the provisions of this Act and the Wild and Scenic Rivers Act and the limitations contained in section 6 of that Act and only: (A) at Fort Benton for the vistor facility as provided in subsection (g)(2) of this section; (B) at the site of Fort McKenzie; (C) in that portion of the river area downstream from Fort Benton to Coal Banks Landing for historic sites, campsites, and access points in accordance with section 202 (1) of this Act; and (D) in that portion of the river area downstream from Coal Banks Landing so as to provide, wherever practicable and necessary for the purposes of this Act and the Wild and Scenic Rivers Act, rim-to-rim protection for such portion.

"(2) In accordance with section 6(b) of the Wild and Scenic Rivers Act, the Secretary shall not acquire fee title to any lands by condemnation under the authority of that Act or this Act, except that the Secretary may use condemnation when necessary and within the limitations on acquisition set forth in clause (1) of this subsection to clear title, acquire scenic easements, or acquire such other easements as are reasonably necessary to give the public access to the river segment within the river area and to permit its members to traverse the length of said river area or of selected portions thereof.

"(3) The Secretary shall, to the extent feasible, give priority in expenditure of funds pursuant to this Act for the acquisition and development of campsites and historic sites, including the site of the visitor center at Fort Benton and the site of Fort McKenzie.

"(c) Consistent with the provisions of this Act and the Wild and Scenic Rivers Act, the Secretary may issue easements, licenses, or permits for rights-of-way through, over, or under the lands in Federal ownership within the river area, or for the use of such lands on such terms and conditions as are in accordance with the provisions of this Act, the Wild and Scenic Rivers Act, and other applicable law.

"(d) The Secretary is authorized to permit the construction of a bridge across the river in the general vicinity of the community of Winifred, Montana, in order to accommodate the flow of north-south traffic. Such construction shall be in accordance with a plan which is mutually acceptable to the Secretary and State and local highway officials, and which is consistent with the purposes of this Act and the Wild and Scenic Rivers Act.

"(e) To the extent and in a manner consistent with the purposes of the Wild and Scenic Rivers Act the Secretary shall permit such pumping facilities and associated pipelines as may be necessary to assure the continuation of an adequate supply of water from the Missouri River to the owners of lands adjacent to the river and for future agricultural use outside the river corridor. The Secretary is authorized to permit such pumping facilities and associated pipelines for use for fish, wildlife, and recreational uses outside the river corridor.

"(f) The Secretary shall permit hunting and fishing in the river area in accordance with applicable Federal and State laws, except that he may designate zones where, and periods when, no hunting, or fishing shall be permitted for reasons of public safety or administration.

"(g)(1) The Secretary, acting through the Bureau of Land Management, shall exercise management responsibilities in the river area for:

"(A) the grazing of livestock;

"(B) the application of the United States mining and mineral leasing laws;

"(C) the management of fish and wildlife habitat;

"(D) the diversion and use of water for agricultural and domestic purposes;

"(E) the acquisition of lands and interests therein;

"(F) the administration of public recreational uses of, and any historic sites and campsites in, the river area; and

"(G) all other management responsibilities except those set forth in paragraph (2) of this subsection.

"(2) The Secretary, acting through the National Park Service, shall be responsible for the construction, operation, and management of any visitor facility in or near Fort Benton which is found necessary in accordance with the management plan developed pursuant to section 202 and the provision, at such facility, of interpretive services for the historic, archeological, scenic, natural, and fish and wildlife resources of the area."

§ 1275. Additions to national wild and scenic rivers system.

(a) Reports by Secretaries of Interior and Agriculture; recommendations to Congress; contents of reports.

The Secretary of the Interior or, where national forest lands are involved, the Secretary of Agriculture or, in appropriate cases, the two Secretaries jointly shall study and submit to the President reports on the suitability or nonsuitability for addition to the national wild and scenic rivers system of rivers which are designated herein or hereafter by the Congress as potential additions to such system. The President shall report to the Congress his recommendations and proposals with respect to the designation of each such river or section thereof under this chapter. Such studies shall be completed and such reports shall be made to the Congress with respect to all rivers named in section 1276(a) (1) through (27) of this title no later than October 2, 1978. In conducting these studies the Secretary of the Interior and the Secretary of Agriculture shall give priority to those rivers (i) with respect to which there is the greatest likelihood of developments which, if undertaken, would render the rivers unsuitable for inclusion in the national wild and scenic rivers system, and (ii) which possess the greatest proportion of private lands within their areas. Every such study and plan shall be coordinated with any water resources planning involving the same river which is being conducted pursuant to the Water Resources Planning Act.

Each report, including maps and illustrations, shall show among other things the area included within the report; the characteristics which do or do not make the area a worthy addition to the system; the current status of land ownership and use in the area; the reasonably foreseeable potential uses of the land and water which would be enhanced, foreclosed, or curtailed if the area were included in the national wild and scenic rivers system; the Federal agency (which in the case of a river which is wholly or substantially within a national forest, shall be the Department of Agriculture) by which it is proposed the area, should it be added to the system, be administered; the extent to which it is proposed that such administration, including the costs thereof, be shared by State and local agencies; and the estimated cost to the United States of acquiring necessary lands and interests in land and of administering the area, should it be added to the system. Each such report shall be printed as a Senate or House document.

(b) Study of report by affected Federal and State officials; recommendations and comments; transmittal to the President and Congress.

Before submitting any such report to the President and the Congress, copies of the proposed report shall, unless it was prepared jointly by the Secretary of the Interior and the Secretary of Agriculture, be submitted by the Secretary of the Interior to the Secretary of Agriculture or by the Secretary of Agriculture to the Secretary of the Interior, as the case may be, and to the Secretary of the Army, the Chairman of the Federal Power Commission, the head of any other affected Federal department or agency and, unless the lands proposed to be included in the area are already owned by the United States or have already been authorized for acquisition by Act of Congress, the Governor of the State or States in which they are located or an officer designated by the Governor to receive the same. Any recommendations or comments on the proposal which the said officials furnished the Secretary or Secretaries who prepared the report within ninety days of the date on which the report is submitted to them, together with the Secretary's or Secretaries' comments thereon, shall be included with the transmittal to the President and the Congress.)

(c) Publication in Federal Register.

Before approving or disapproving for inclusion in the national wild and scenic rivers system any river designated as a wild, scenic or recreational river by or pursuant to an act of a State legislature, the Secretary of the Interior shall submit the proposal to the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Federal Power Commission, and the head of any other affected Federal department or agency and shall evaluate and give due weight to any recommendations or comments which the said officials furnish him within ninety days of the date on which it is submitted to them. If he approves the proposed inclusion, he shall publish notice thereof in the Federal Register. (Pub. L. 90-542, § 4, Oct. 2, 1968, 82 Stat. 909; amended Pub. L. 94-486, § 501, Oct. 12, 1976, 90 Stat. 2330.)

AMENDMENT

1976—Sec. 501: deleted the last sentence of subsec. (b).

§ 1276. Rivers constituting potential additions to the national wild and scenic rivers system.

(a) Enumeration of designated rivers.

The following rivers are hereby designated for potential addition to the national wild and scenic rivers system:

(1) Allegheny, Pennsylvania: The segment from its mouth to the town of East Brady, Pennsylvania.

(2) Bruneau, Idaho: The entire main stem.

(3) Buffalo, Tennessee: The entire river.

(4) Chattooga, North Carolina, South Carolina, and Georgia: The entire river.

(5) Clarion, Pennsylvania: The segment between Ridgway and its confluence with the Allegheny River.

(6) Delaware, Pennsylvania and New York: The segment from Hancock, New York, to Matamoras, Pennsylvania.

(7) Flathead, Montana: The North Fork from the Canadian border downstream to its confluence with the Middle Fork; the Middle Fork from its headwaters to its confluence with the South Fork; and the South Fork from its origin to Hungary Horse Reservoir.

(8) Gasconade, Missouri: The entire river.

(9) Illinois, Oregon: The entire river.

(10) Little Beaver, Ohio: The segment of the North and Middle Forks of the Little Beaver River in Columbiana County from a point in the vicinity of Negly and Elkton, Ohio, downstream to a point in the vicinity of East Liverpool, Ohio.

(11) Little Miami, Ohio: That segment of the main stem of the river, exclusive of its tributaries, from a point at the Warren-Clermont County line at Loveland, Ohio, upstream to the sources of Little Miami including North Fork.

(12) Maumee, Ohio and Indiana: The main stem from Perrysburg, Ohio, to Fort Wayne, Indiana, exclusive of its tributaries in Ohio and inclusive of its tributaries in Indiana.

(13) Missouri, Montana: The segment between Fort Benton and Ryan Island.

(14) Moyie, Idaho: The segment from the Canadian border to its confluence with the Kootenai River.

(15) Obed, Tennessee: The entire river and its tributaries, Clear Creek and Daddys Creek.

(16) Penobscot, Maine: Its east and west branches.

(17) Pere Marquette, Michigan: The entire river.

(18) Pine Creek, Pennsylvania: The segment from Ansonia to Waterville.

(19) Priest, Idaho: The entire main stem.

(20) Rio Grande, Texas: The portion of the river between the west boundary of Hudspeth County and the east boundary of Terrell County on the United States side of the river: *Provided*, That before undertaking any study of this potential scenic river, the Secretary of the Interior shall determine, through the channels of appropriate executive agencies, that Mexico has no objection to its being included among the studies authorized by this chapter.

(21) Saint Croix, Minnesota and Wisconsin: The segment between the dam near Taylors Falls and its confluence with the Mississippi River.

(22) Saint Joe, Idaho: The entire main stem.

(23) Salmon, Idaho: The segment from the town of North Fork to its confluence with the Snake River.

(24) Skagit, Washington: The segment from the town of Mount Vernon to and including the mouth of Bacon Creek; the Cascade River between its mouth and the junction of its North and South Forks; the South Fork to the boundary of the Glacier Peak Wilderness Area; the Suiattle River from its mouth to the Glacier Peak Wilderness Area boundary at Milk Creek; the Sauk River from its mouth to its junction with Elliott Creek; the North Fork of the Sauk River from its junction with the South Fork of the Sauk to the Glacier Peak Wilderness Area boundary.

(25) Suwannee, Georgia and Florida: The entire river from its source in the Okefenokee Swamp in Georgia to the gulf and the outlying Ichetucknee Springs, Florida.

(26) Upper Iowa, Iowa: The entire river.

(27) Youghiogheny, Maryland and Pennsylvania: The segment from Oakland, Maryland, to the Youghiogheny Reservoir, and from the Youghiogheny Dam downstream to the town of Connellsville, Pennsylvania.

(28) American, California: The North Fork from the Cedars to the Auburn Reservoir.

(29) Au Sable, Michigan: The segment downstream from Foot Dam to Oscoda, and upstream from Loud Reservoir to its source, including its principal tributaries and excluding Mio and Bamfield Reservoirs.

(30) Big Thompson, Colorado: The segment from its source to the boundary of Rocky Mountain National Park.

(31) Cache la Poudre, Colorado: Both forks from their sources to their confluence, thence the Cache la Poudre to the eastern boundary of Roosevelt National Forest.

(32) Cahaba, Alabama: The segment from its junction with United States Highway 31 south of Birmingham downstream to its junction with United States Highway 80 west of Selma.

(33) Clarks Fork, Wyoming: The segment from the Clark's Fork Canyon to the Crandall Creek Bridge.

(34) Colorado, Colorado and Utah: The segment from its confluence with the Dolores River, Utah, upstream to a point 19.5 miles from the Utah-Colorado border in Colorado.

(35) Conejos, Colorado: The three forks from their sources to their confluence, thence the Conejos to its first junction with State Highway 17, excluding Platoro Reservoir.

(36) Elk, Colorado: The segment from its source to Clark.

(37) Encampment, Colorado: The Main Fork and West Fork to their confluence, thence the Encampment to the Colorado-Wyoming border, including the tributaries and headwaters.

(38) Green, Colorado: The entire segment within the State of Colorado.

(39) Gunnison, Colorado: The segment from the upstream (southern) boundary of the Black Canyon of the Gunnison National Monument to its confluence with the North Fork.

(40) Illinois, Oklahoma: The segment from Tenkiller Ferry Reservoir upstream to the Arkansas-Oklahoma border, including the Flint and Barren Fork Creeks.

(41) John Day, Oregon: The main stem from Service Creek Bridge (at river mile 157) downstream to Tumwater Falls (at river mile 10).

(42) Kettle, Minnesota: The entire segment within the State of Minnesota.

(43) Los Pinos, Colorado: The segment from its source, including the tributaries and headwaters within the San Juan Primitive Area, to the northern boundary of the Granite Peak Ranch.

(44) Manistee, Michigan: The entire river from its source to Manistee Lake, including its principal tributaries and excluding Tippy and Hodenpyl Reservoirs.

(45) Nolichuckey, Tennessee and North Carolina: The entire main stem.

(46) Owyhee, South Fork, Oregon: The main stem from the Oregon-Idaho border downstream to the Owyhee Reservoir.

(47) Piedra, Colorado: The Middle Fork and East Fork from their sources to their confluence, thence the Piedra to its junction with Colorado Highway 160.

(48) Shepaug, Connecticut: The entire river.

(49) Sipsey Fork, West Fork, Alabama: The segment, including its tributaries, from the impoundment formed by the Lewis M. Smith Dam upstream to its source in the William B. Bankhead National Forest.

(50) Snake, Wyoming: The segment from the southern bounaries of Teton National Park to the entrance to Palisades Reservoir.

(51) Sweetwater, Wyoming: The segment from Wilson Bar downstream to Spring Creek.

(52) Tuolumne, California: The main river from its source on Mount Dana and Mount Lyell in Yosemite National Park to Don Pedro Reservoir.

(53) Upper Mississippi, Minnesota: The segment

from its source at the outlet of Itasca Lake to its junction with the northwestern boundary of the city of Anoka.

(54) Wisconsin, Wisconsin: The segment from Prairie du Sac to its confluence with the Mississippi River at Prairie du Chien.

(55) Yampa, Colorado: The segment within the boundaries of the Dinosaur National Monument.

(56) Dolores, Colorado: The segment of the main stem from Rico upstream to its source, including its headwaters; the West Dolores from its source, including its headwaters, downstream to its confluence with the main stem; and the segment from the west boundary, section 2, township 38 north, range 16 west, NMPM, below the proposed McPhee Dam, downstream to the Colorado-Utah border, excluding the segment from one mile above Highway 90 to the confluence of the San Miguel River.

(57) Snake, Washington, Oregon, and Idaho: the segment from an eastward extension of the north boundary of section 1, township 5 north, range 47 east, Willamette meridian, downstream to the town of Asotin, Washington.

(58) Housatonic, Connecticut: The segment from the Massachusetts-Connecticut boundary downstream to its confluence with the Shepaug River.

(b) Studies and reports.

(1) The studies of rivers named in subparagraphs (28) through (55) of subsection (a) of this section shall be completed and reports thereon submitted by not later than October 2, 1979: *Provided*, That with respect to the rivers named in subparagraphs (33), (50), and (51), the Secretaries shall not commence any studies until (i) the State legislature has acted with respect to such rivers or (ii) one year from January 3, 1975, whichever is earlier.

(2) The study of the river named in subparagraph (56) of subsection (a) of this section shall be completed and the report thereon submitted by not later than January 3, 1976.

(3) There are authorized to be appropriated for the purpose of conducting the studies of the rivers named in subparagraphs (28) through (56) such sums as may be necessary, but not more than $2,175,000.

(c) State participation.

The study of any of said rivers shall be pursued in as close cooperation with appropriate agencies of the affected State and its political subdivisions as possible, shall be carried on jointly with such agencies if request for such joint study is made by the State and shall include a determination of the degree to which the State or its political subdivisions might participate in the preservation and administration of the river should it be proposed for inclusion in the national wild and scenic rivers system.

(d) Continuing consideration by Federal agencies to potential national, wild, scenic and recreational river areas.

In all planning for the use and development of water and related land resources, consideration shall be given by all Federal agencies involved to potential national wild, scenic and recreational river areas, and all river basin and project plan reports submitted to the Congress shall consider and discuss any such potentials. The Secretary of the Interior and the Secretary of Agriculture shall make specific studies and investigations to determine which additional wild, scenic and recreational river areas within the United States shall be evaluated in planning reports by all Federal agencies as potential alternative uses of the water and related land resources involved. (As amended Pub. L. 93-279, § 1(b)(2), May 10, 1974, 88 Stat. 123; Pub. L. 93-621, § 1(a), (b), Jan. 3, 1975, 88 Stat. 2094, 2095; Pub. L. 94-199, § 5(a), Dec. 31, 1975, 89 Stat. 1118; Pub. L. 94-486 §§ 401, 701, Oct. 12, 1976, 90 Stat. 2330.)

AMENDMENTS

1976—Subsec. (a), Pub. L. 94-486, § 401, added par. (58); § 701 amended par. (47).

1975—Subsec. (a). Pub. L. 94-199 added par. (57).

1975—Subsec. (a). Pub. L. 93-621, § 1(a), added pars. (28) to (56).

Subsec. (b). Pub. L. 93-621, § 1(b), added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 93-621, § 1(b), redesignated subsec. (b) as (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 93-621, § 1(b), redesignated subsec. (c) as (d).

1974—Subsec. (b) Pub. L. 93-279 redesignated subsec. (c) as subsec. (b) Former subsec. (b) relating to the study of rivers named in subsec. (a) of this section for inclusion in the national wild and scenic river system and submission of reports to the President and the Congress, was incorporated in section 1275(a) of this title.

Subsec. (c). Pub. L. 93-279 redesignated subsec. (d) as (c). Former subsec. (c) redesignated (b).

Subsec. (d). Pub. L. 93-279 redesignated subsec. (d) as (c).

§ 1277. Land acquisition.

(a) Grant of authority to acquire; State and Indian lands; use of appropriated funds.

The Secretary of the Interior and the Secretary of Agriculture are each authorized to acquire lands and interests in land within the authorized boundaries of any component of the national wild and scenic rivers system designated in section 1274 of this title, or hereafter designated for inclusion in the system by Act of Congress, which is administered by him, but he shall not acquire fee title to an average of more than 100 acres per mile on both sides of the river. Lands owned by a State may be acquired only by donation, and lands owned by an Indian tribe or a political subdivision of a State may not be acquired without the consent of the appropriate governing body thereof as long as the Indian tribe or political subdivision is following a plan for management and protection of the lands which the Secretary finds protects the land and assures its use for purposes consistent with this chapter. Money appropriated for Federal purposes from the land and water conservation fund shall, without prejudice to the use of appropriations from other sources, be available to Federal departments and agencies for the acquistion of property for the purposes of this chapter.

(b) Curtailment of condemnation power in area 50 per centum or more of which is owned by Federal or State government.

If 50 per centum or more of the entire acreage

within a federally administered wild, scenic or recreational river area is owned by the United States, by the State or States within which it lies, or by political subdivisions of those States, neither Secretary shall acquire fee title to any lands by condemnation under authority of this chapter. Nothing contained in this section, however, shall preclude the use of condemnation when necessary to clear title or to acquire scenic easements or such other easements as are reasonably necessary to give the public access to the river and to permit its members to traverse the length of the area or of selected segments thereof.

(c) Curtailment of condemnation power in urban areas covered by valid and satisfactory zoning ordinances.

Neither the Secretary of the Interior nor the Secretary of Agriculture may acquire lands by condemnation, for the purpose of including such lands in any national wild, scenic or recreational river area, if such lands are located within any incorporated city, village, or borough which has in force and applicable to such lands a duly adopted, valid zoning ordinance that conforms with the purposes of this chapter. In order to carry out the provisions of this subsection the appropriate Secretary shall issue guidelines, specifying standards for local zoning ordinances, which are consistent with the purposes of this chapter. The standards specified in such guidelines shall have the object of (A) prohibiting new commercial or industrial uses other than commercial or industrial uses which are consistent with the purposes of this chapter, and (B) the protection of the bank lands by means of acreage, frontage, and setback requirements on development.

(d) Exchange of property.

The appropriate Secretary is authorized to accept title to non-Federal property within the authorized boundaries of any federally administered component of the national wild and scenic rivers system designated in section 1274 of this title or hereafter designated for inclusion in the system by Act of Congress and, in exchange therefor, convey to the grantor any federally owned property which is under his jurisdiction within the State in which the component lies and which he classifies as suitable for exchange or other disposal. The values of the properties so exchanged either shall be approximately equal or, if they are not approximately equal, shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

(e) Transfer of jurisdiction over Federally owned property to appropriate Secretary.

The head of any Federal department or agency having administrative jurisdiction over any lands or interests in land within the authorized boundaries of any federally administered component of the national wild and scenic rivers system designated in section 1274 of this title or hereafter designated for inclusion in the system by Act of Congress is authorized to transfer to the appropriate secretary jurisdiction over such lands for administration in accordance with the provisions of this chapter. Lands acquired by or transferred to the Secretary of Agriculture for the purposes of this chapter within or adjacent to a national forest shall upon such acquisition or transfer become national forest lands.

(f) Acceptance of donated land, funds, and other property.

The appropriate Secretary is authorized to accept donations of lands and interests in land, funds, and other property for use in connection with his administration of the national wild and scenic rivers system.

(g) Retained right of use and occupancy; termination; fair market value; improved property.

(1) Any owner or owners (hereinafter in this subsection referred to as "owner") of improved property on the date of its acquisition, may retain for themselves and their successors or assigns a right of use and occupancy of the improved property for noncommercial residential purposes for a definite term not to exceed twenty-five years or, in lieu thereof, for a term ending at the death of the owner, or the death of his spouse, or the death of either or both of them. The owner shall elect the term to be reserved. The appropriate Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such date of the right retained by the owner.

(2) A right of use and occupancy retained pursuant to this subsection shall be subject to termination whenever the appropriate Secretary is given reasonable cause to find that such use and occupancy is being exercised in a manner which conflicts with the purposes of this chapter. In the event of such a finding, the Secretary shall tender to the holder of that right an amount equal to the fair market value of that portion of the right which remains unexpired on the date of termination. Such right of use or occupancy shall terminate by operation of law upon tender of the fair market price.

(3) The term "improved property", as used in this chapter, means a detached, one-family dwelling (hereinafter referred to as "dwelling"), the construction of which was begun before January 1, 1967, together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the appropriate Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures accessory to the dwelling which are situated on the land so designated. (Pub. L. 90–542, § 6, Oct. 2, 1968, 82 Stat. 912.)

§ 1278. Restrictions on water resources projects.

(a) Construction projects licensed by Federal Power Commission.

The Federal Power Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is designated in section 1274 of this title as a component of the national wild and scenic rivers system or which is hereafter designated for inclusion in that system, and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration. Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on October 2, 1968. No department or agency of the United States shall recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration, or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior or the Secretary of Agriculture, as the case may be, in writing of its intention so to do at least sixty days in advance, and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this chapter and would affect the component and the values to be protected by it under this chapter.

Any license heretofore or hereafter issued by the Federal Power Commission affecting the New River of North Carolina shall continue to be effective only for that portion of the river which is not included in the National Wild and Scenic Rivers System pursuant to section 1273 of this title and no project or undertaking so licensed shall be permitted to invade, inundate or otherwise adversely affect such river segment.

(b) Construction projects on rivers designated for potential addition to the system.

The Federal Power Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is listed in section 1276(a) of this title, and no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river might be designated, as determined by the Secretary responsible for its study or approval—

(i) during the ten-year period following October 2, 1968, or for a three complete fiscal year period following any Act of Congress designating any river for potential addition to the national wild and scenic rivers system, whichever is later, unless, prior to the expiration of the relevant period, the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture, on the basis of study, determine that such river should not be included in the national wild and scenic rivers system and notify the Committees on Interior and Insular Affairs of the United States Congress, in writing, including a copy of the study upon which the determination was made, at least one hundred and eighty days while Congress is in session prior to publishing notice to that effect in the Federal Register: *Provided*, That if any Act designating any river or rivers for potential addition to the national wild and scenic rivers system provides a period for the study or studies which exceeds such three complete fiscal year period the period provided for in such Act shall be substituted for the three complete fiscal year period in the provisions of this clause (i); and

(ii) during such additional period thereafter as, in the case of any river the report for which is submitted to the President and the Congress, is necessary for congressional consideration thereof or, in the case of any river recommended to the Secretary of the Interior for inclusion in the national wild and scenic rivers system under section 1273(a)(ii) of this title, is necessary for the Secretary's consideration thereof, which additional period, however, shall not exceed three years in the first case and one year in the second.

Nothing contained in the foregoing sentence, however, shall preclude licensing of, or assistance to, developments below or above a potential wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or diminish the scenic, recreational, and fish and wildlife values present in the potential wild, scenic or recreational river area on the date of approval of this chapter. No department or agency of the United States shall, during the periods hereinbefore specified, recommend authorization of any water resources project on any such river or request appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture in writing of its intention so to do at least sixty days in advance of doing so and without specifically reporting to the Congress in writing at the time it makes its recommendation or request in what respect construction of such project would be in conflict with the purposes of this chapter and would affect the component and the values to be protected by it under this chapter.

(c) Activities in progress affecting river of the system; notice to Secretary.

The Federal Power Commission and all other Federal agencies shall, promptly upon enactment of this chapter, inform the Secretary of the Interior and, where national forest lands are involved, the Secretary of Agriculture, of any proceedings, studies, or other activities within their jurisdiction which are now in progress and which affect or may affect any of the rivers specified in section 1276(a) of this title. They shall likewise inform him of any such proceedings, studies, or other activities which are hereafter commenced or resumed before they are commenced or resumed.

(d) Grants under Land and Water Conservation Fund Act of 1965.

Nothing in this section with respect to the making of a loan or grant shall apply to grants made under the Land and Water Conservation Fund Act of 1965.

(As amended Pub. L. 93-279, § 1(b) (3), (4), May 10, 1974, 88 Stat. 123; Pub. L. 93-621, § 1(c), Jan. 3, 1975, 88 Stat. 2096. Pub. L. 94-407, Sept. 11, 1976.)

Amendments

1976—Pub. L. 94-407 added the last sentence in subsec. (a).

1975—Subsec. (b)(i). Pub. L. 93-621 added the proviso that if any Act provides a time period for study in excess of the three fiscal year period, that period shall be substituted for the three complete fiscal year period provision of cl. (i).

1974—Subsec. (b)(i). Pub. L. 93-279, § 1(b)(3), substituted provisions that construction projects may not be licensed or assisted before Oct. 2, 1978, or for a three year period following inclusion of a river in the list of rivers for potential addition to the national wild and scenic river system, unless, prior to that period, the Secretary of the Interior or the Secretary of Agriculture, as the case may be, determined that such river should not be so included and notified the Committees on Interior and Insular Affairs, before publication in the Federal Register, for provisions that such projects may not be licensed or assisted before Oct. 2, 1978, unless, prior to that period, the Secretary of the Interior or the Secretary of Agriculture, as the case may be, concluded that such river should not be so included and published notice to that effect in the Federal Register.

Subsec. (b)(ii). Pub. L. 93-279, § 1(b)(4), substituted "the report for which is submitted to the President and the Congress, is necessary" for "which is recommended to the President and the Congress for inclusion in the national wild and scenic rivers system, is necessary".

§ 1279. Withdrawal of public lands from entry, sale, or other disposition under public land laws.

(a) All public lands within the authorized boundaries of any component of the national wild and scenic rivers system which is designated in section 1274 of this title or which is designated after October 2, 1968, for inclusion in that system are hereby withdrawn from entry, sale, or other disposition under the public land laws of the United States.

(b) All public lands which constitute the bed or bank, or are within one-quarter mile of the bank, of any river which is listed in section 1276(a) of this title are hereby withdrawn from entry, sale, or other disposition under the public land laws of the United States for the periods specified in section 1278(b) of this title. (Pub. L. 90-542, § 8, Oct. 2, 1968, 82 Stat. 915.)

§ 1280. Federal mining and mineral leasing laws.

(a) Nothing in this chapter shall affect the applicability of the United States mining and mineral leasing laws within components of the national wild and scenic rivers system except that—

(i) all prospecting, mining operations, and all other activities on mining claims which, in the case of a component of the system designated in section 1274 of this title, have not heretofore been perfected or which, in the case of a component hereafter designated pursuant to this chapter or any other Act of Congress, are not perfected before its inclusion in the system and all mining operations and other activities under a mineral lease, license, or permit issued or renewed after inclusion of a component in the system shall be subject to such regulations as the Secretary of the Interior or, in the case of national forest lands, the Secretary of Agriculture may prescribe to effectuate the purposes of this chapter;

(ii) subject to valid existing rights, the perfection of, issuance of a patent to, any mining claim affecting lands within the system shall confer or convey a right or title only to the mineral deposits and such rights only to the use of the surface and the surface resources as are reasonably required to carrying on prospecting or mining operations and are consistent with such regulations as may be prescribed by the Secretary of the Interior or, in the case of national forest lands, by the Secretary of Agriculture; and

(iii) subject to valid existing rights, the minerals in Federal lands which are part of the system and constitute the bed or bank or are situated within one-quarter mile of the bank of any river designated a wild river under this chapter or any subsequent Act are hereby withdrawn from all forms of appropriation under the mining laws and from operation of the mineral leasing laws including, in both cases, amendments thereto.

Regulations issued pursuant to paragraphs (i) and (ii) of this subsection shall, among other things, provide safeguards against pollution of the river involved and unnecessary impairment of the scenery within the component in question.

(b) The minerals in any Federal lands which constitute the bed or bank or are situated within one-quarter mile of the bank of any river which is listed in section 1276(a) of this title are hereby withdrawn from all forms of appropriation under the mining laws during the periods specified in section 1278(b) of this title. Nothing contained in this subsection shall be construed to forbid prospecting or the issuance of leases, licenses, and permits under the mineral leasing laws subject to such conditions as the Secretary of the Interior and, in the case of national forest lands, the Secretary of Agriculture find appropriate to safeguard the area in the event it is subsequently included in the system. (Pub. L. 90-542, § 9, Oct. 2, 1968, 82 Stat. 915.)

§ 1281. Administration.

(a) Public use and enjoyment of components; protection of features; management plans.

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features. Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.

(b) Wilderness areas.

Any portion of a component of the national wild and scenic rivers system that is within the national wilderness preservation system, as established by or pursuant to the Wilderness Act, shall be subject to the provisions of both the Wilderness Act and this chapter with respect to preservation of such river and its immediate environment, and in case of conflict between the provisions of the Wilderness Act and this chapter the more restrictive provisions shall apply.

(c) Areas administered by National Park Service and Fish and Wildlife Service.

Any component of the national wild and scenic rivers system that is administered by the Secretary of the Interior through the National Park Service shall become a part of the national park system, and any such component that is administered by the Secretary through the Fish and Wildlife Service shall become a part of the national wildlife refuge system. The lands involved shall be subject to the provisions of this chapter and the Acts under which the national park system or national wildlife system, as the case may be, is administered, and in case of conflict between the provisions of this chapter and such Acts, the more restrictive provisions shall apply. The Secretary of the Interior, in his administration of any component of the national wild and scenic rivers system, may utilize such general statutory authorities relating to areas of the national park system and such general statutory authorities otherwise available to him for recreation and preservation purposes and for the conservation and management of natural resources as he deems appropriate to carry out the purposes of this chapter.

(d) Statutory authorities relating to national forests.

The Secretary of Agriculture, in his administration of any component of the national wild and scenic rivers system area, may utilize the general statutory authorities relating to the national forests in such manner as he deems appropriate to carry out the purposes of this chapter.

(e) Cooperative agreements with State and local governments.

The Federal agency charged with the administration of any component of the national wild and scenic rivers system may enter into written cooperative agreements with the Governor of a State, the head of any State agency, or the appropriate official of a political subdivision of a State for State or local governmental participation in the administration of the component. The States and their political subdivisions shall be encouraged to cooperate in the planning and administration of components of the system which include or adjoin State- or county-owned lands. (Pub. L. 90–542, § 10, Oct. 2, 1968, 82 Stat. 916.)

§ 1282. Assistance in financing State and local projects.

(a) The Secretary of the Interior shall encourage and assist the States to consider, in formulating and carrying out their comprehensive statewide outdoor recreation plans and proposals for financing assistance for State and local projects submitted pursuant to the Land and Water Conservation Fund Act of 1965, needs and opportunities for establishing State and local wild, scenic and recreational areas. He shall also, in accordance with the authority contained in the Act of May 28, 1963, provide technical assistance and advice to, and cooperate with, States, political subdivisions, and private interests, including nonprofit organizations, with respect to establishing such wild, scenic and recreational river areas.

(b) The Secretaries of Agriculture and of Health, Education, and Welfare shall likewise, in accordance with the authority vested in them assist, advise, and cooperate with State and local agencies and private interests with respect to establishing such wild, scenic and recreational river areas. (Pub. L. 90–542, § 11, Oct. 2, 1968, 82 Stat. 916.)

§ 1283. Administration and management policies.

(a) Review by Secretaries and heads of agencies.

The Secretary of the Interior, the Secretary of Agriculture, and heads of other Federal agencies shall review administrative and management policies, regulations, contracts, and plans affecting lands under their respective jurisdictions which include, border upon, or are adjacent to the rivers listed in section 1276(a) of this title in order to determine what actions should be taken to protect such rivers during the period they are being considered for potential addition to the national wild and scenic rivers system. Particular attention shall be given to scheduled timber harvesting, road construction, and similar activities which might be contrary to the purposes of this chapter.

(b) Existing rights, privileges, and contracts affecting Federal lands.

Nothing in this section shall be construed to abrogate any existing rights, privileges, or contracts affecting Federal lands held by any private party without consent of said party.

(c) Water pollution.

The head of any agency administering a component of the national wild and scenic rivers system shall cooperate with the Secretary of the Interior and with the appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters of the river. (Pub. L. 90–542, § 12, Oct. 2, 1968, 82 Stat. 917.)

§ 1284. Existing State jurisdiction and responsibilities.

(a) Fish and wildlife.

Nothing in this chapter shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife. Hunting and fishing shall be permitted on lands and waters administered as parts of the system under applicable State and Federal laws and regulations unless, in the case of hunting, those lands or waters are within a national park or monument. The administering Secretary may, however, designate zones where, and establish periods when, no hunting is permitted for reasons of public safety, administration, or public use and enjoyment and shall issue appropriate regulations after consultation with the wildlife agency of the State or States affected.

(b) Compensation for water rights.

The jurisdiction of the States and the United States over waters of any stream included in a national wild, scenic or recreation river area shall be determined by established principles of law. Under the provisions of this chapter, any taking by the United States of a water right which is vested under either State or Federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just compensation. Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(c) Reservation of waters for other purposes or in unnecessary quantities prohibited.

Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.

(d) State jurisdiction over included streams.

The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration.

(e) Interstate compacts.

Nothing contained in this chapter shall be construed to alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by any States which contain any portion of the national wild and scenic rivers system.

(f) Rights of access to streams.

Nothing in this chapter shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, sciencic or recreational river area.

(g) Easements and rights-of-way.

The Secretary of the Interior or the Secretary of Agriculture, as the case may be, may grant easements and rights-of-way upon, over, under, across, or through any component of the national wild and scenic rivers system in accordance with the laws applicable to the national park system and the national forest system, respectively: *Provided*, That any conditions precedent to granting such easements and rights-of-way shall be related to the policy and purpose of this chapter. (Pub. L. 90-542, § 13, Oct. 2, 1968, 82 Stat. 917.)

§ 1285. Claim and allowance of charitable deduction for contribution or gift of easement.

The claim and allowance of the value of an easement as a charitable contribution under section 170 of Title 26, or as a gift under section 2522 of said title shall constitute an agreement by the donor on behalf of himself, his heirs, and assigns that, if the terms of the instrument creating the easement are violated, the donee or the United States may acquire the servient estate at its fair market value as of the time the easement was donated minus the value of the easement claimed and allowed as a charitable contribution or gift. (Pub. L. 90-542, § 14, Oct. 2, 1968, 82 Stat. 918.)

§ 1286. Definitions.

As used in this chapter, the term—

(a) "River" means a flowing body of water or estuary or a section, portion, or tributary thereof, including rivers, streams, creeks, runs, kills, rills, and small lakes.

(b) "Free-flowing", as applied to any river or section of a river, means existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence, however, of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the national wild and scenic rivers system shall not automatically bar its consideration for such inclusion: *Provided*, That this shall not be construed to authorize, intend, or encourage future construction of such structures within components of the national wild and scenic rivers system.

(c) "Scenic easement" means the right to control the use of land (including the air space above such land) within the authorized boundaries of a component of the wild and scenic rivers system, for the purpose of protecting the natural qualities of a designated wild, scenic or recreational river area, but such control shall not affect, without the owner's consent, any regular use exercised prior to the acquisition of the easement. (As amended Pub. L. 93-279, § 1(c), May 10, 1974, 88 Stat. 123.)

AMENDMENTS

1974—Subsec. (c). Pub. L. 93-279 substituted "within the natual qualities cf a designated wild, scenic o rrecreational river area" for "for the purpose of protecting the natural qualities of a designated wild, scenic or recreational river area" for "for the purpose of protecting the scenic view from the river".

§ 1287. Authorization of appropriations.

(a) There are hereby authorized to be appropriated, including such sums as have heretofore been appropriated, the following amounts for land acquisition for each of the rivers (described in section 1274 (a) of this title):

Clearwater, Middle Fork, Idaho, $2,909,800;
Eleven Point, Missouri, $4,906,500;
Feather Middle Fork, California, $3,935,700;
Rio Grande, New Mexico, $253,000;
Rogue, Oregon, $12,447,200;
St. Croix, Minnesota and Wisconsin, $11,768,550;
Salmon Middle Fork, Idaho, $1,237,100; and
Wolf, Wisconsin, $142,150.

(b) The authority to make the appropriations authorized in this section shall expire on Sept. 30, 1979. (As amended Pub. L. 93-279, § 1(d), May 10, 1974, 88 Stat. 123.)

AMENDMENTS

1974—Pub. L. 93-279 added subsecs. (a) and (b). Former unlettered provisions authorizing appropriation of amounts up to $17,000,000 for the acquisition of lands and interests in land, were stricken.

TAB I
HISTORIC PRESERVATION

federal register

TUESDAY, JANUARY 30, 1979
PART IV

THE NATIONAL ARCHIVES OF THE UNITED STATES • 1934 •

ADVISORY COUNCIL ON HISTORIC PRESERVATION

◆

PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Final Amendments

[4310-10-M]

Title 36—Parks, Forests, and Public Property

CHAPTER VIII—ADVISORY COUNCIL ON HISTORIC PRESERVATION

PART 800—PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Amendments to Existing Regulations

AGENCY: Advisory Council on Historic Preservation.

ACTION: Final amendments to regulations.

SUMMARY: These regulations implement Section 106 of the National Historic Preservation Act 1966, as amended (16 U.S.C. 470), and two Presidential directives issued pursuant to Section 106—Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment" (36 FR 8921, 16 U.S.C. 470), and the President's Memorandum on Environmental Quality and Water Resources Management, July 12, 1978. The regulations have been amended to reflect changes and additions to the Council's authorities, as well as experience gained in working with the process since the last publication of regulations in 1974. These amendments are intended to expedite and clarify the commenting process required by Section 106 of the National Historic Preservation Act.

EFFECTIVE DATE: March 1, 1979.

FOR FURTHER INFORMATION CONTACT:

John M. Fowler, Acting General Counsel, Advisory Council on Historic Preservation, 1522 K Street, NW, Washington, D.C. 20005, 202-254-3967.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Advisory Council on Historic Preservation is publishing these final amendments to its existing regulations to implement Section 106 of the National Historic Preservation Act, as amended (16 U.S.C. 470f). The purpose of Section 106 is to protect properties included in or eligible for inclusion in the National Register of Historic Places through review and comment by the Council on Federal undertakings that affect such properties. Properties are listed on the National Register or declared eligible for listing by the Secretary of the Interior. As implemented through these regulations, the Section 106 process is a public interest process in which the Federal agency proposing an undertaking, the State Historic Preservation Officer, the Council, and interested organizations and individuals participate. The process is designed to assure that alternatives to avoid or mitigate an adverse effect on a National Register or eligible property are adequately considered in the planning processes. The regulations are binding on all Federal agencies and specify the manner in which the Council will render its comments to Federal agencies when their undertakings affect properties included in or eligible for inclusion in the National Register of Historic Places. To facilitate processing of the large volume of cases submitted for Council comment each year, the regulations provide for agency consultation with the Council staff and State Historic Preservation Officers to reduce the number of undertakings that require consideration by the full Council.

The purpose of the present amendments is to reduce procedural delay, encourage agencies to develop internal regulations to comply with the requirements of the Act and these regulations, to clarify the process since the last publication of the Council's regulations in 1974, and to implement the directives in the President's Memorandum on Environmental Quality and Water Resources Management.

In late 1977, the Council staff began a reassessment of the existing regulations codified in 1974 in 36 CFR Part 800, in an effort to determine what changes, clarifications, or modifications were necessary. In July of 1978, the President issued the Memorandum on Environmental Quality and Water Resources Management which directed the Chairman of the Council to review and promulgate regulations implementing the Act and the Memorandum by March 1, 1979. Accordingly, the existing regulations were amended to reflect changes in statutory authority, experience gained in implementing the procedures since 1974, and to meet the demands of the President's Memorandum.

The Council published proposed amendments to the existing regulations in the FEDERAL REGISTER on October 30, 1978, and invited public comment for a 30 day period. A number of Federal agencies and others requested extension of the comment period. On November 28, 1978, the Council published notice in the FEDERAL REGISTER extending the comment period for an additional thirty days until December 29, 1978, providing for a 60 day comment period in total. A public briefing for interested agencies, organizations, and individuals on the proposed amendments was held on December 11, 1978. Council staff also actively cooperated with the Secretary of the Interior's Water Policy Implementation Task Force on Environmental Statutes. The Task Force was convened in response to the directives contained in the President's Memorandum. The Task Force was charged with reviewing the draft regulations and informally offering comments to the Council on whether the regulations comply with the directive.

Pursuant to the President's Memorandum, agencies with consultation responsibilities under the Act must develop regulations to be approved by the Chairman of the Council in response to these regulations. Such agencies must publish regulations no later than three months after the effective date of these regulations. Other agencies may choose to adopt counterpart regulations specifically tailored to their particular program needs as stipulated in these regulations.

These regulations issued pursuant to 16 U.S.C. 470s were adopted by unanimous vote of the full Council in open session on January 17, 1979. As directed by the President, the amended regulations will be effective March 1, 1979.

SUMMARY OF MAJOR CHANGES

The flow of the commenting process established by the 1974 regulations remains basically unchanged in the present amendments. However, the regulations have been renumbered and rearranged from the 1974 publication for greater clarity. The following major changes have been made in the regulations:

1. Section 800.4(a) has been substantially revised to provide further guidance to Federal agencies on the identification of National Register and eligible properties.
2. A new § 800.5 has been added to define the responsibilities of State Historic Preservation Officers in the commenting process.
3. Section 800.6(d) authorizes the Chairman to appoint a panel of five members of the Council to consider undertakings in lieu of consideration by the full Council.
4. A new § 800.7 has been added dealing with resources discovered during construction.
5. A new § 800.8 has been added dealing with Programmatic Memoranda of Agreement allowing an agency to obtain the Council's comments for a particular program or class of undertakings that would otherwise require numerous individual requests for comments.
6. Section 800.9 revises the original section dealing with the National Environmental Policy Act to reflect new Council on Environmental Quality regulations.
7. A new § 800.11 has been added to authorize counterpart regulations permitting agencies to develop regulations which, if approved by the Chair-

man, may be used to meet certain requirements of these regulations.

8. A new § 800.15 has been added dealing with public participation in the Section 106 review process.

9. A new § 800.14 has been added on Supplementary Guidance. The Supplementary Guidelines included in the proposed amendments have been deleted. Supplementary Guidelines II and IV have been included in § 800.13.

10. Throughout the amended regulations, time limits have been established to expedite the process while encouraging maximum public participation.

COMMENTS AND THE COUNCIL'S RESPONSE

The Council received 128 comments prior to the close of the comment period on December 29, 1978. An additional 16 comments were received between December 30, 1978, and the Council meeting on January 17 and 18, 1979. All comments were submitted to the Council members for review prior to the meeting. Comments were received from 32 Federal agencies, 27 State Historic Preservation Officers, 33 State or local governments, and 52 private organizations or individuals, and one U.S. Senator.

SECTION 800.1 PURPOSE AND AUTHORITIES

The section was slightly reworded in response to several suggestions to make the language closer to that of the Act and Executive Order. A section was added summarizing the President's Memorandum on Environmental Quality and Water Resources Management.

SECTION 800.2 DEFINITIONS

Section 800.2(c) was clarified in response to several agency comments that the scope of the term "undertaking" was too broad and unclear. Of particular concern was the inclusion of activities proposed by Federal agencies for Congressional authorization or appropriation. This definition is not to be construed as requiring general program authorization and program appropriation requests to be reviewed under these regulations. The purpose is to ensure proper and timely consideration of specific activities that will have significant impacts on National Register or eligible properties and that provide limited opportunity after Congressional action to consider alternatives to avoid or mitigate these impacts. Such activities are usually major Federal construction projects that are proposed for Congressional approval at a specific site or with specific design features, such as a dam. Section 106 review would be appropriate prior to authorization or, in the case of projects authorized without prior Section 106 compliance, during the agency's formulation of a budget request to be submitted to the Office of Management and Budget. In either event agencies should complete their Section 106 responsibilities prior to making submissions to the Office of Management and Budget. Agencies will comply with the requirements of OMB Circular A-10, which concerns budget confidentiality.

Authorizations for programs that will have uniform adverse effects on National Register or eligible properties and where the legislative terms of authorization may severely limit the opportunity to avoid or mitigate adverse effects on a case by case basis are also included. An example would be the recent Special Bridge Replacement Program, which, in its original form, prohibited the use of funds for anything but replacement of unsafe bridges. The result was that alternatives such as rehabilitation were foreclosed when a particular National Register or eligible bridge was proposed for replacement. When seeking Council comments on such a program agencies should follow the provisions of § 800.8, "Programmatic Memorandum of Agreement."

The definition of eligible property contained in § 800.2(f) has been rewritten to more closely reflect statutory language and was changed in response to a Federal member agency. Several commenters were of the opinion that the Council should review only those undertakings affecting properties actually listed on the National Register. Such a limitation is contrary to the mandate of the National Historic Preservation Act, and was not adopted.

A definition of the area of the undertaking's potential environmental impact is contained in § 800.2(o). Several comments expressed concern about the difficulty in defining this term. The definition no longer includes reference to secondary effects and is consistent with the definition adopted by the Council on Environmental Quality. This new section has been modified since the draft amendments by the addition of the requirement that the boundaries of such an area are to be determined by the Agency Official and the State Historic Preservation Officer.

Section 800.2(p), Consulting Parties, is a new section. Many commenters expressed confusion as to who the parties to the consultation process were.

SECTION 800.3 CRITERIA OF EFFECT AND ADVERSE EFFECT

Section 800.3 was the subject of many comments. The entire section has been reworked for greater clarity. A definition of direct and indirect effects has been added and the definition deliberately tracks that used by the Council on Environmental Quality for purposes of the National Environmental Policy Act. The new language of this section is now tied closely to the National Register Criteria. One commenter suggested that only significant effects be covered by these regulations. This comment was not adopted because it is contrary to statutory requirements.

SECTION 800.4 FEDERAL AGENCY RESPONSIBILITIES

This section describes the means by which a Federal agency should identify National Register or eligible properties and determine whether an undertaking affects such properties and provides for coordination with the State Historic Preservation Officers. A large number of comments were received on the entire section. Many Federal agencies felt that further clarification of the entire section was needed. In response to these comments, the section has been re-structured. The Council has adopted a reasonable effort standard for Federal agencies to meet in identifying National Register and eligible properties. Federal agency responsibilities for determination of effect are also set forth in this section. The ultimate responsibility for compliance with the regulations rests with the Federal agency and cannot be delegated by it.

Section 800.4(a) has been altered in response to numerous comments including several from Federal agencies. The section has been re-drafted to set forth a logical sequence needed to identify properties. Throughout the process of identification, there should be consultation between the Agency Official and the State Historic Preservation Officer. The section makes clear that an agency can request the Council's comments simultaneously with a request for eligibility from the Secretary of the Interior. The Council believes that the reorganized section is clearer and that it will allow agencies to know in more precise terms what is required to identify National Register or eligible properties.

Section 800.4(b), Determination of Effect, also received numerous comments from Federal agencies and others. The section on No Effect (800.4(b)(1)) has been clarified concerning how an objection can be made and the manner in which the Executive Director will respond.

Section 800.4(c) concerning Determination of No Adverse Effect has been clarified in response to several comments. No Adverse Effect Determinations must be made in consultation with the appropriate State Historic Preservation Officer and evidence of contact with a State Historic Preservation Officer must be included in the documentation forwarded to the

Council if the State Historic Preservation Officer does not respond to a request under the provisions of § 800.5.

Section 800.4(d) has been slightly altered in response to several comments. The transmittal of a Preliminary Case Report will be the request for the comments of the Council.

A new § 800.4(e) has been added providing that good faith consultation would prevent an agency from proceeding with an undertaking until the Council has provided its comments. The section, while appearing in substantially the same form in several sections in the draft amendments, is now one section. It is included as one section at the request of a Federal agency member of the Council.

SECTION 800.5 STATE HISTORIC PRESERVATION OFFICER RESPONSIBILITIES

Section 800.5, State Historic Preservation Officer Responsibilities, is a new section. The section establishes deadlines for response on the part of this official, after which the process may continue if no response has been received. Pursuant to a substantial number of comments, however, lack of response by the State Historic Preservation Officer will no longer be deemed concurrence, although the review may still proceed. Several commenters suggested that the "shoulds" used in this section be changed to "shalls." The suggestion was rejected because the Council lacks authority to impose mandatory requirements on these State officials.

SECTION 800.6 COUNCIL COMMENTS

This section concerns the manner in which the Council will render its comments. There were a substantial number of comments on this section. In response to these comments, numerous changes were made to clear up ambiguities and make the Council's commenting process more expeditious.

Section 800.6(a) concerns the manner in which the Executive Director will respond to an agency Determination of No Adverse Effect. In response to comments, a specific time limit has been placed on the Executive Director's acceptance of adequate documentation and the time period for review of such Determinations of No Adverse Effect has been reduced from the 45 days stipulated in the 1974 regulations to 30 days.

A new § 800.6(a)(2) provides that the Executive Director may specify conditions to remove an objection to a No Adverse Effect Determination. Several commenters suggested that the State Historic Preservation Officer should be included in this process. It is the intention of the Council to include the State Historic Preservation Officer through the addition of a provision in § 800.6(a)(2) which allows the Executive Director to consult the State Historic Preservation Officer and other interested parties.

Section 800.6(b) parallels the existing regulations. However, several changes have been made, including provisions for specific time limits throughout the consultation process. Although a number of commenters felt that parties in interest to an undertaking should have the status of a consulting party, these comments were not adopted because the Council does not believe that it can impose such a uniform requirement due to the wide variety of agency programs. At the request of several Federal agencies, a lead agency provision is also included in this section.

In response to comments, § 800.6(b)(3) has been changed to provide that the public information meeting should be held near the site of the undertaking.

A new § 800.6(b)(6) on acceptance of adverse effect has been included. Previously, the Council equated acceptance of Adverse Effect with mitigation measures such as recording of a structure that was being demolished. The Council realizes that there are circumstances in which adverse effects on National Register or eligible properties must be accepted in the public interest. In such instances, the adverse effect will be accepted, generally with a proviso that a recording effort be part of the agreement.

Section 800.6(b)(7) has been clarified in response to comments. Any one of the consulting parties may declare a failure in the consultation process upon written notice to the Executive Director who is required to notify the Chairman of the failure within 15 days.

Section 800.6(c) concerning the Memorandum of Agreement has been rewritten in response to comments. An important change from the existing regulations is an expedited method for preparing the Memorandum of Agreement. A Federal agency will prepare a proposal, which together with the written concurrence of the State Historic Preservation Officer can be transmitted to the Executive Director and incorporated into the Memorandum of Agreement.

Many commenters agreed with the Council that this would speed up the process, but only if there were time limits placed on the process for ratification of an agreement. The Council agreed and a limit of 10 days has been imposed for transmittal of such Memoranda to the Chairman.

A new § 800.6(c)(3) dealing with the effect of a Memorandum of Agreement has been added. This subsection provides that if an agency fails to carry out the terms of the agreement that the comments of the Council must again be requested. Several commenters suggested that in such instances agencies should be admonished that no further action on the undertaking should proceed until the Council has commented. The Council agrees and this section has been revised accordingly.

In response to comments, § 800.6(c)(4) has been changed to provide that any signatory to the agreement can request a change in the terms. At the request of several commenters a new section has also been added which requires the Agency Official to provide a report on actions taken to carry out the terms of the agreement.

Section 800.6(d) dealing with Council meetings has been revised in response to comments. When the Chairman decides against consideration by the Council of a proposed undertaking, it can be scheduled if three members of the Council object. The proposed amendments would have required that a majority of the members object. Numerous commenters felt that such a large number was unrealistic. A major change from the 1974 regulations is the provision for a panel of members to consider an undertaking on behalf of the full Council. Such a panel would be composed of 5 members, three non-Federal members and two Federal members, neither of whom represents the agency proposing the undertaking. The Council believes that this provision will serve to both increase the number of cases referred for Council consideration and to expedite those cases. Several Council members felt that consideration of an undertaking by a panel would not be representative of the full range of views provided by the entire Council membership. After discussion at the full Council meeting on January 17, 1979, it was agreed that panel consideration of an undertaking may be advantageous in some situations. However, the Council felt that this provision should be re-examined in one year to determine the effectiveness of panel review of undertakings.

A number of comments were received on the section dealing with the review of a panel decision. Many commenters pointed out that an appeal of a panel decision by any one of the parties involved as proposed in the draft amendments could actually delay the process rather than speeding it up. The Council agrees with this assessment and the appeal provision has been deleted. However, if an agency determines not to follow the comments of a panel after considering the comments, it must provide notice to the Chairman in order to provide opportunity to have the matter considered by the full Council. Because of the nature of panel consideration of an undertaking, the comments were not adopted which suggested that no consideration of an undertaking beyond a panel was necessary.

In response to comments, time limits for notice of Council meetings and statements to the Council have been extended to provide ample opportunity for public participation. Section 800.6(d)(5) has been changed to provide that the comments of the Council will be issued within 15 days after a meeting and that such comments will be made available to interested parties, including the State Historic Preservation Officer.

SECTION 800.7 RESOURCES DISCOVERED DURING CONSTRUCTION

This section was proposed as a addition to the 1974 regulations. As originally proposed, the section was intended to establish a limited time period for the Council to provide its comments to an agency when a resource eligible for the National Register was discovered during the actual construction of a project after an agency had previously completed its Section 106 responsibilities. While there were several unqualified endorsements, the majority of the commenters felt that the section as proposed would cause undue project delays resulting in additional costs. The section was substantially rewritten in light of these comments. The mandatory halt of construction has been eliminated, although the Council believes that good faith consultation requires that an agency make reasonable efforts to avoid foreclosing options while the Council's comments are being sought. As drafted, § 800.7 applies only to those resources discovered during construction that meet the National Register Criteria. Agencies that discover National Register eligible properties during construction are required to comply with the provisions of the Archeological and Historic Preservation Act of 1974. The Council is adopting, as the standard for Section 106 compliance, mitigation acceptable to the Secretary of the Interior under the provisions of the Archeological and Historic Preservation Act. Therefore, an agency will be deemed to have met its responsibilities to afford the Council an opportunity to comment if it complies with the provisions of the Archeological and Historic Preservation Act, unless the Secretary determines that certain aspects of the undertaking warrant Council consideration. If Council consideration is determined to be necessary, a 30-day time limit has been placed on the transmittal of comments. The Council believes that this provision will serve to reduce time delays and effectively protect the resource.

SECTION 800.8 PROGRAMMATIC MEMORANDUM OF AGREEMENT

This section was developed as a means of allowing the Council to comment on a particular program or class of actions that would otherwise require multiple individual requests for comments under the regulations. This will expedite the review process and eliminate individual reviews of undertakings that are repetitive in nature. For example, the Council has executed a programmatic agreement with the National Park Service concerning the Park planning system. Under the terms of the agreement, individual actions taken to implement a master plan for a particular park that has previously been reviewed by the Council will normally not be subjected to further Council review.

A number of commenters suggested that the process include the State Historic Preservation Officers in States affected by such an agreement or the National Conference of State Historic Preservation Officers when the agreement is nationwide in scope. The regulations have been revised to specifically allow for such participation. Other changes have been made in the section to clarify ambiguities pointed out by a number of commenters.

SECTION 800.9 COORDINATION WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

This section sets forth the manner in which the review conducted under Section 106 should be coordinated with that required by the National Environmental Policy Act. This section elaborates on § 800.2 of the 1974 regulations and has been developed in consultation with the staff of the Council on Environmental Quality. It is the intention of the two agencies to issue joint supplementary guidance on this subject in the near future. The purpose of the section is to combine to the maximum extent possible the information on resources, evaluation of effects, and analysis of alternatives required by the separate statutes. For most projects, the Council's comments should be requested during the preparation of the draft environmental impact statement. Some commenters noted several classes of Federal projects which cannot be coordinated in this manner. The regulations have been revised to specifically provide for this situation. It is the Council's objective to provide its comments on an agency undertaking that requires an environmental impact statement in time to be included in the final statement. This should result in less paperwork and reduce delays in fulfilling agency environmental review responsibilities by allowing a single document to be used to meet the information requirements of both statutes.

SECTION 800.10 COORDINATION WITH THE PRESIDENT'S MEMORANDUM ON ENVIRONMENTAL QUALITY AND WATER RESOURCES MANAGEMENT

This section recapitulates the mandates contained in the Memorandum to agencies with water resources responsibilities to develop regulations to implement the Council's Section 106 regulations. A number of commenters requested the Council to add requirements for additional review of the required regulations and to develop stringent standards for the regulations. The Council will issue guidance to agencies to develop such regulations.

SECTION 800.11 COUNTERPART REGULATIONS

This section has been revised to allow Federal agencies greater flexibility in implementing the procedural requirements of these regulations. Section 800.11 as proposed in the draft amendments dealt briefly with the development of agency procedures under Section 1(3) of Executive Order 11593. The revised section was developed from suggestions received from several Federal agencies. Under this section, an agency may choose to develop counterpart regulations that can be tailored to meet the specific requirements of its planning and decision making processes. Section 800.11 would permit agencies to develop counterpart regulations for meeting their responsibilities under Section 800.4. This section requires that the regulations be jointly drafted with the Executive Director and approved by the Chairman and provides an opportunity for public participation.

SECTION 800.12 INVESTIGATION OF THREATS TO NATIONAL REGISTER AND ELIGIBLE PROPERTIES

This section deals with situations where the Council has reason to believe that a Federal undertaking affecting a National Register or eligible property has not been reviewed in accordance with these regulations. Several clarifications were made to this section in response to specific comments. Some Federal agencies expressed a desire that the Council use discretion in investigating such threats. The Council intends to do so. Previously, these provisions were included in § 800.13(b). In the draft of the proposed amendments § 800.13(a) included a provision for comment or report on non-Federal undertakings. This section has been deleted because it is based on the Council's general advisory authorities under Section 202 of the Act and not on Section 106. The Council will continue to exercise its general advisory authority under Section 202 and will consider matters in the public interest.

SECTION 800.13 REPORTS TO THE COUNCIL

This section sets standards for information that should be provided to the Council to enable it to make informed comments on Federal undertakings. Sections 800.13(a) and (b) were previously included in the Supplementary Guidelines section. A large number of commenters requested that these standards for adequate documentation be codified. The Council agrees with these comments and believes that codifying these sections will make the requirements clear to all the consulting parties and the public. Section 800.13(c) dealing with Reports for Council Meetings includes a new section prescribing the Secretary of the Interior's Report. This section requests the Secretary to verify existing information on the historical or cultural significance of a National Register or eligible property and reflects the current practice of the Council. A number of commenters felt that the section was not entirely clear concerning how reports for Council meetings should be coordinated. The section has been re-drafted to respond to these comments.

SECTION 800.14 SUPPLEMENTARY GUIDANCE

This is a new section which provides that the Executive Director may issue further guidance to interpret certain portions of the regulations.

SECTION 800.15 PUBLIC PARTICIPATION

This is a new section which is designed to encourage public participation throughout the process established by the regulations. A number of comments urged that the regulations contain more explicit direction concerning the means of involving the public. Several suggested that such reference to public participation be included in various specific sections. The Council believes that a specific section dealing with public participation will best serve to fulfill the intended purpose of involving the public. The Council notes that its process is advisory and does not constitute formal administrative hearings. Therefore, this section is intended for guidance and is not to be construed as setting a strict legal standard. For example, the use of the word "notice" in subsection (b) is not intended to be a formal legal requirement, but rather a means of informing the public of an opportunity to participate in the process.

OTHER

The Supplementary Guidelines contained in the publication of the draft amendments have been deleted. Supplementary Guidelines II and IV have been codified as part of § 800.13. Supplementary Guideline I, the Criteria of the National Register of Historic Places, is contained in 36 CFR 60.6. Supplementary Guideline III, Determinations of No Effect and No Adverse Effect for Archeological Resources, will not be published at the present time. The Council's Task Force on Archeology will be considering this guideline and it will be revised based upon recommendations of the Task Force. This Guideline received numerous comments and they have been provided to the Task Force for its consideration.

CONCLUSION

The Council made a conscientious effort to incorporate all valid comments in these final amendments. As noted, revisions have been made to the regulations which we believe will serve to make the Section 106 commenting process an open and public process that can be tailored to the needs of individual agencies. The Council believes that the regulations set a clear standard for agencies to follow in meeting their Section 106 responsibilities, while being sufficiently flexible to respond to the wide variety of agency programs and needs.

The Council has determined that these amendments are not significant regulations within the meaning of Executive Order 12044 and consequently do not require a regulatory analysis. The purpose of these amendments is to simplify existing regulations and to clarify language in conformance with the goals enunciated by Executive Order 12044.

The Council has determined that an Environmental Impact Statement under the National Environmental Policy Act is not required.

PRINCIPAL AUTHORS

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ROBERT R. GARVEY, Jr.,
Executive Director.

Part 800 is revised to read as set forth below:

PART 800—PROTECTION OF HISTORIC AND CULTURAL PROPERTIES

Sec.
800.1 Purpose and authorities.
800.2 Definitions.
800.3 Criteria of effect and advance effect.

REVIEW OF INDIVIDUAL UNDERTAKINGS

800.4 Federal Agency Responsibilities.
800.5 State Historic Preservation Officer Responsibilities.
800.6 Council comments.
800.7 Resources discovered during construction.

FEDERAL PROGRAM COORDINATION

800.8 Programmatic Memorandum of Agreement.
800.9 Coordination with the National Environmental Policy Act (42 U.S.C. 4321 et seq.)
800.10 Coordination with the Presidential Memorandum on environmental quality and water resources management.
800.11 Counterpart regulations.

OTHER PROVISIONS

800.12 Investigation of threats to historic properties.
800.13 Reports to the Council.
800.14 Supplementary guidance.
800.15 Public participation.

AUTHORITY: Pub. L. 89-665, 80 Stat. 915 (16 U.S.C. 470), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978); E.O. 11593, 3 CFR 1971 Comp, p. 154; President's Memorandum on Environmental Quality and Water Resources Management, July 12, 1978.

§ 800.1 Purpose and authorities.

(a) The National Historic Preservation Act of 1966, as amended, established the Advisory Council on Historic Preservation as an independent agency of the United States to advise the President and the Congress on historic preservation matters, recommend measures to coordinate Federal historic preservation activities, and comment on Federal actions affecting properties included in or eligible for inclusion in the National Register of Historic Places. Its members are the Secretary of the Interior, the Secretary of Housing and Urban Development, the Secretary of Commerce, the Administrator of General Services, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Transportation, the Secretary of State, the Secretary of Defense, the Secretary of Health, Education, and Welfare, the Chairman of the Council on Environmental Quality, the Chairman of the Federal Council on the Arts and Humanities, the Architect of the Capitol, the Secretary of the Smithsonian Institution, the Chairman of the National Trust for Historic Preservation, the President of the National Conference of State Historic Preservation Officers, and 12 citizen members from outside the Federal Government appointed for five-year terms by the President on the basis of their interest and experience in the matters to be considered by the Council.

(b) The Council protects properties of historical, architectural, archeological, and cultural significance at the national, State, and local level by reviewing and commenting on Federal actions affecting National Register and eligible properties in accordance with the following authorities:

(1) Section 106 of the National Historic Preservation Act. Section 106 requires that Federal agencies with direct or indirect jurisdiction over a Federal, federally assisted or federally licensed undertaking afford the Council a reasonable opportunity for comment on such undertakings that affect properties included in or eligible for inclusion in the National Register of Historic Places prior to the agency's approval of any such undertaking.

(2) Section 1(3) of Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment." Section 1(3) requires that Federal agencies, in consultation with the Council, institute procedures to assure that their plans and programs contribute to the preservation and enhancement of non-federally owned historic and cultural properties.

(3) Section 2(b) of Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment." Federal agencies are required by Section 2(a) of the Executive Order to locate, inventory, and nominate properties under their jurisdiction or control to the National Register. Until such processes are complete, Federal agencies must provide the Council an opportunity to comment on proposals for the transfer, sale, demolition, or substantial alteration of federally owned properties eligible for inclusion in the National Register.

(4) The President's Memorandum on Environmental Quality and Water Resources Management. The Memorandum directs the Council to issue final regulations under the National Historic Preservation Act by March 1, 1979, and further directs Federal agencies with water resource responsibilities and programs to publish procedures implementing the Act not later than three months after promulgation of final regulations by the Council. Federal agencies' procedures are to be reviewed and, if they are consistent with the Council's regulations, approved by the Council within 60 days and published in final form.

§ 800.2 Definitions.

As used in these regulations:

(a) "National Historic Preservation Act" means Pub. L. 89-665, approved October 15, 1966, an "Act to establish a program for the preservation of additional historic properties throughout the Nation and for other purposes" (80 Stat. 915, 16 U.S.C. 470, as amended; 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978)), hereinafter referred to as "the Act."

(b) "Executive Order" means Executive Order 11593, May 13, 1971, "Protection and Enhancement of the Cultural Environment" (36 FR 8921, 16 U.S.C. 470).

(c) "Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-Federal action, activity, or program. Undertakings include new and continuing projects and program activities (or elements of such activities not previously considered under Section 106 or Executive Order 11593) that are: (1) Directly undertaken by Federal agencies; (2) supported in whole or in part through Federal contracts, grants, subsidies, loans, loan guarantees, or other forms of direct and indirect funding assistance; (3) carried out pursuant to a Federal lease, permit, license, certificate, approval, or other form of entitlement or permission; or, (4) proposed by a Federal agency for Congressional authorization or appropriation. Site-specific undertakings affect areas and properties that are capable of being identified at the time of approval by the Federal agency. Non-site-specific undertakings have effects that can be anticipated on National Register and eligible properties but cannot be identified in terms of specific geographical areas or properties at the time of Federal approval. Non-site-specific undertakings include Federal approval of State plans pursuant to Federal legislation, development of comprehensive or area-wide plans, agency recommendations for legislation and the establishment or modification of regulations and planning guidelines.

(d) "National Register" means the National Register of Historic Places. It is a register of districts, sites, buildings, structures, and objects of national, State, or local significance in American history, architecture, archeology, and culture that is expanded and maintained by the Secretary of the Interior under authority of section 2(b) of the Historic Sites Act of 1935 (49 Stat. 666, 16 U.S.C. 461) and Section 101(a)(1) of the National Historic Preservation Act implemented through 36 CFR Part 60. The National Register is published in its entirety in the FEDERAL REGISTER each year in February. Addenda are usually published on the first Tuesday of each month.

(e) "National Register property" means a district, site, building, structure, or object included in the National Register.

(f) "Eligible property" means any district, site, building, structure, or object that meets the National Register Criteria.

(g) "National Register Criteria" means the criteria established by the Secretary of the Interior to evaluate properties to determine whether they are eligible for inclusion in the National Register. (See 36 CFR 60.6.)

(h) "Decision" means the exercise of or the opportunity to exercise discretionary authority by a Federal agency at any stage of an undertaking where alterations might be made in the undertaking to modify its impact upon National Register and eligible properties.

(i) "Agency Official" means the head of the Federal agency having responsibility for the undertaking or a designee authorized to act for the Agency Official.

(j) "Council" means the Advisory Council on Historic Preservation as established by Title II of the Act.

(k) "Chairman" means the Chairman of the Advisory Council on Historic Preservation or a member designated to act for the Chairman.

(l) "Executive Director" means the Executive Director of the Advisory Council on Historic Preservation as established by Section 205 of the Act, or a designee authorized to act for the Executive Director.

(m) "State Historic Preservation Officer" means the official, who is responsible for administering the Act within the State or jurisdiction, or a designated representative authorized to act for the State Historic Preservation Officer. These officers are appointed pursuant to 36 CFR Part 61.2 by the Governors of the 50 States, Guam, American Samoa, the Commonwealth of Puerto Rico, the Virgin Islands, the Trust Territory of the Pacific Islands, the Commonwealth of the Mariana Islands, and the Mayor of the District of Columbia.

(n) "Secretary" means the Secretary of the Interior or a designee authorized to carry out the historic preservation responsibilities of the Secretary under the Act, Executive Order 11593, and related authorities.

(o) "Area of the undertaking's potential environmental impact" means that geographical area within which direct and indirect effects generated by the undertaking could reasonably be expected to occur and thus cause a change in the historical, architectural, archeological, or cultural qualities possessed by a National Register or eligible property. The boundaries of such area should be determined by the Agency Official in consultation with the State Historic Preservation Officer as early as possible in the planning of the undertaking.

(p) "Consulting parties" means the Agency Official, the State Historic Preservation Officer, and the Executive Director.

§ 800.3 Criteria of effect and adverse effect.

The following criteria shall be used to determine whether an undertaking has an effect or an adverse effect in accordance with these regulations.

(a) *Criteria of Effect.* The effect of a Federal, federally assisted or federally licensed undertaking on a National Register or eligible property is evaluated in the context of the historical, architectural, archeological, or cultural signficance possessed by the property. An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property to meet the criteria of the National Register. An effect occurs when an undertaking changes the integrity of location, design, setting, materials, workmanship, feeling, or association of the property that contributes to its significance in accordance with the National Register criteria. *An* effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or farther removed in distance, but are still reasonably foreseeable. Such effects may include changes in the pattern of land use, population density or growth rate that may affect on properties of historical, architectural, archeological, or cultural significance.

(b) *Criteria of Adverse Effect.* Adverse effects on National Register or eligible properties may occur under conditions which include but are not limited to:

(1) Destruction or alteration of all or part of a property;

(2) Isolation from or alteration of the property's surrounding environment;

(3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

(4) Neglect of a property resulting in its deterioration or destruction.

(5) Transfer or sale of a property without adequate conditions or restrictions regarding preservation, maintenance, or use.

REVIEW OF INDIVIDUAL UNDERTAKINGS

§ 800.4 Federal Agency responsibilities.

As early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any action that would foreclose alternatives or the Council's ability to comment, the Agency Official shall take the following steps to comply with the requirements of Section 106 of the National Historic Preservation Act and Section 2(b) of Executive Order 11593. It is the primary responsibility of each Agency Official requesting Council comments to conduct the appropriate studies and to provide the information necessary for an adequate review of the effect a proposed undertaking may have on a National Register or eligible property, as well as the information necessary for adequate consideration of modifications or alterations to the proposed undertaking that could avoid, mitigate, or minimize any adverse effects. It is the responsibility of each Agency Official requesting consultation with a State Historic Preservation Officer under this section to provide the information that is necessary to make an informed and reasonable evaluation of whether a property meets National Register criteria and to determine the effect of a proposed undertaking on a National Register or eligible property. Although a Federal agency may require non-Federal parties to undertake certain steps required by these regulations as a prerequisite to Federal action and may authorize non-Federal participation under this section and in the consultation process under Section 800.6 pursuant to approved counterpart regulations, the ultimate responsibility for compliance with these regulations remains with the Federal agency and cannot be delegated by it.

(a) *Identification of National Register and Eligible Properties.* It is the responsibility of each Federal agency to identify or cause to be identified any National Register or eligible property that is located within the area of the undertaking's potential environmental impact and that may be affected by the undertaking.

(1) The Agency Official shall consult the State Historic Preservation Officer, the published lists of National Register and eligible properties, public records, and other individuals or organizations with historical and cultural expertise, as appropriate, to determine what historic and cultural properties are known to be within the area of the undertaking's potential environmental impact. The State Historic Preservation Officer should provide the Agency Official with any information available on known historic and cultural properties identified in the area (whether on the National Register or not), information on any previous surveys performed and an evaluation of their quality, a recommendation as to the need for a survey of historic and cultural properties, and recommendations as to the type of survey and/or survey methods should a survey be recommended, and recommendations on boundaries of such surveys.

(2) The Agency Official shall, after due consideration of the information obtained pursuant to § 800.4(a)(1), determine what further actions are necessary to discharge the agency's affirmative responsibilities to locate and identify eligible properties that are within the area of the undertaking's potential environmental impact and that may be affected by the undertaking. Such actions may include a professional cultural resource survey of the environmental impact area, or parts of the area, if the area has not previously been adequately surveyed. The recommendations of the State Historic Preservation Officer should be followed in this matter.

(3) The Agency Official, in consultation with the State Historic Preservation Officer, shall apply the National Register criteria to all properties that may possess any historical, architectural, archeological, or cultural value located within the area of the undertaking's potential environmental impact. If either the Agency Official or the State Historic Preservation Officer finds that a property meets the National Register Criteria or a question exists as to whether a property meets the Criteria, the Agency Official shall request a determination of eligibility from the Secretary of the Interior in accordance with 36 CFR Part 63. The opinion of the Secretary respecting the eligibility of a property shall be conclusive for the purposes of these regulations. If the Agency Official and the State Historic Preservation Officer agree that no identified property meets the Criteria, the Agency Official shall document this finding and, unless the Secretary has otherwise made a determination of eligibility under 36 CFR Part 63, may proceed with the undertaking.

(4) The Agency Official shall complete the preceding steps prior to requesting the Council's comments pursuant to Section 800.4(b)-(d). The Agency Official may, however, initiate a request for the Council's comments simultaneously with a request for a determination of eligibility from the Secretary when the Agency Official and the State Historic Preservation Officer agree that a property meets the National Register Criteria. Before the Council completes action pursuant to § 800.6, the Secretary must find the property eligible for inclusion in the National Register.

(b) *Determination of Effect.* For each National Register or eligible property that is located within the area of the undertaking's potential environmental impact, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Effect, (§ 800.3(a)), to determine whether the undertaking will have an effect upon the historical, architectural, archeological, or cultural characteristics of the property that qualified it to meet National Register Criteria.

(1) *No Effect.* If the Agency Official, in consultation with the State Historic Preservation Officer, finds that the undertaking will not affect these characteristics, the undertaking may proceed. The Agency Official shall document each Determination of No Effect, which shall be available for public inspection. If the State Historic Preservation Officer objects or other timely objection is made to the Executive Director to an Agency Official's Determination of No Effect, the Executive Director may review the Determination and advise the Agency Official, the State Historic Preservation Officer and any objecting party of the findings within 15 days.

(2) *Effect determined.* If the Agency Official or the Executive Director finds that the undertaking will have an effect upon these characteristics, the Agency Official, in consultation with the State Historic Preservation Officer, shall apply the Criteria of Adverse Effect, set forth in section 800.3(b), to determine whether the effect of the undertaking may be adverse.

(c) *Determinations of no adverse effect.* If the Agency Official, in consultation with the State Historic Preservation Officer, finds the effect on the historical, architectural, archeological, or cultural characteristics of the property not to be adverse, the Agency Official shall forward adequate documentation (See § 800.13(a)) of the Determination, including written evidence of the views of the State Historic Preservation Officer, to the Executive Director for review in accordance with Section 800.6. If the State Historic Preservation Officer fails to respond to an Agency Official's request as provided in Section 800.5, the Agency Official shall include evidence of having contacted the State Historic Preservation Officer.

(d) *Adverse effect determination.* If the Agency Official finds the effect on the historical, architectural, archeological, or cultural characteristics of the property to be adverse, or if the Executive Director does not accept an Agency Official's Determination of No Adverse Effect pursuant to review under Section 800.6, the Agency Official shall:

(1) Prepare and submit a Preliminary Case Report requesting the comments of the Council (See § 800.13(b)),

(2) Notify the State Historic Preservation Officer of this request, and

(3) Proceed with the consultation process set forth in § 800.6.

(e) *Suspense of action.* Until the Council issues its comments under these regulations, good faith consultation shall preclude a Federal agency from taking or sanctioning any action or making any irreversible or irretrievable commitment that could result in an adverse effect on a National Register or eligible property or that would foreclose the consideration of modifications or alternatives to the proposed undertaking that could avoid, mitigate, or minimize such adverse effects.

§ 800.5 State Historic Preservation Officer responsibilities.

(a) The State Historic Preservation Officer should participate in the review process established by these regulations whenever it concerns an undertaking located within the State Historic Preservation Officer's jurisdiction.

(b) Unless a longer time is agreed to by the Agency Official, the failure of a State Historic Preservation Officer to respond to an Ageny Official's request for consultation under Section 800.4 within 30 days after receipt shall not prohibit the Agency Official from proceeding with the review process under these regulations.

(c) The State Historic Preservation Officer, with the Agency Official and the Executive Director, should participate in any consultation under § 800.6(b) and sign any Memorandum of Agreement developed under § 800.6(c) of these regulations. Failure of a State Historic Preservation Officer to participate in a consultation under § 800.6(b) or to sign a Memorandum of Agreement as provided in § 800.6(c)(1) within 30 days of receipt without notifying the Executive Director and the Agency Official that the State Historic Preservation Officer disagrees with the terms of the Agreement shall not prohibit the Executive Director and the Agency Official from concluding the Agreement and having it ratified by the Chairman in accordance with § 800.6(c)(2).

§ 800.6 Council comments.

The following subsections specify how the Council will respond to Federal agency requests for the Council's comments required to satisfy an agency's responsibilities under Section 106 of the Act and Section 2(b) of the Executive Order.

(a) *Response to determinations of no adverse effect.* (1). Upon receipt of a Determination of No Adverse Effect from an Agency Official, the Executive Director will review the Determination and supporting documentation. Normally, the Executive Director will concur without delay. If the documentation is not adequate, the Executive Director will so inform the Agency Official within 15 days. Unless the Executive Director objects to the Determination within 30 days after receipt of an adequately documented Determination, the Agency Official will be considered to have satisfied the agency's responsibilities under Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations, and may proceed with the undertaking.

(2) If the Executive Director objects to a Determination of No Adverse Effect, the Executive Director shall specify the basis for the objection and may specify conditions which will eliminate the objection. As appropriate, the Executive Director may consult the Agency Official, the State Historic Preservation Officer, and other interested parties in specifying conditions. If the Agency Official accepts the conditions in writing, the conditions will be incorporated into the agency's Determination and the Executive Director's objection will be withdrawn. The Agency Official then will be considered to have satisfied the agency's responsibilities under Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations, and may proceed with the undertaking.

(3) If the Agency Official does not accept the Executive Director's conditions or if the Executive Director objects to a Determination of No Adverse Effect without specifying conditions that would remove the objection, the Executive Director shall initiate the consultation process pursuant to § 800.6(b).

(b) *Consultation Process.* The Agency Official, the State Historic Preservation Officer, and the Executive Director shall be the consulting parties to consider feasible and prudent alternatives to the undertaking that could avoid, mitigate, or minimize adverse effects on a National Register or eligible property. When an undertaking involves more than one Federal agency, these agencies may, upon notification to the Executive Director, coordinate their consultation responsibilities through a single lead agency. Grantees, permittees, licensees, or other parties in interest, and representatives of national, State, or local units of government and public and private organizations, may be invited by the consulting parties to participate in the consultation process.

(1) *Preliminary Case Report.* The Agency Official shall provide copies of the report to the consulting parties at the initiation of the consultation and make it readily available for public inspection.

(2) *On-site inspection.* At the request of any of the consulting parties, the Agency Official shall conduct an on-site inspection.

(3) *Public Information Meeting.* At the request of any of the consulting parties, the Executive Director shall conduct a meeting open to the public, where representatives of national, State, or local units of government, representatives of public or private or-

ganizations, and interested citizens may receive information and express their views on the undertaking, its effects on the National Register or eligible property, and alternate courses of action that could avoid, mitigate, or minimize any adverse effects on such properties. The Agency Official shall provide adequate facilities for the meeting near the site of the undertaking and shall afford appropriate notice to the public, generally at least 15 days in advance of the meeting.

(4) *Consideration of Alternatives.* Upon review of the proposed undertaking and after any on-site inspection or public information meeting, the consulting parties shall determine whether there are feasible and prudent alternatives to avoid the adverse effects on National Register or eligible property. If the consulting parties cannot agree on an alternative to avoid, they shall consult further to determine if there are alternatives that could satisfactorily mitigate the adverse effects.

(5) *Avoidance or Satisfactory Mitigation of Adverse Effect.* If the consulting parties agree upon a feasible and prudent alternative to avoid or satisfactorily mitigate the adverse effects of the undertaking on the National Register or eligible property, they shall execute a Memorandum of Agreement in accordance with § 800.6(c) specifying how the undertaking will proceed to avoid or mitigate the adverse effect.

(6) *Acceptance of Adverse Effect.* If the consulting parties determine that there are no feasible and prudent alternatives that could avoid or satisfactorily mitigate the adverse effects and agree that it is in the public interest to proceed with the proposed undertaking, they shall execute a Memorandum of Agreement in accordance with § 800.6(c) acknowledging this determination and specifying any recording, salvage, or other measures to minimize the adverse effects that shall be taken before the undertaking proceeds.

(7) *Failure to Agree.* Upon the failure of the consulting parties to agree upon the terms for a Memorandum of Agreement, or upon notice of such failure by any of the consulting parties to the Executive Director, the Executive Director shall notify the Chairman within fifteen days and shall recommend whether or not the matter should be scheduled for consideration at a Council meeting. The Agency Official and the State Historic Preservation Officer shall be notified in writing of the Executive Director's recommendation.

(c) *Memorandum of Agreement*—(1) *Preparation of Memorandum of Agreement.* It shall be the responsibility of the Executive Director to prepare each Memorandum of Agreement required under these regulations. Unless otherwise requested by the Executive Director, the Agency Official shall prepare a proposal for inclusion in the Agreement that details the actions agreed upon by the consulting parties to be taken to avoid, satisfactorily mitigate, or accept the adverse effects on the property. The State Historic Preservation Officer's written concurrence shall be included in this proposal by the Agency Official. If the Executive Director determines that the proposal represents the agreement of the consulting parties, he shall within 10 days forward it as a Memorandum of Agreement to the Chairman for ratification pursuant to § 800.6(c)(2). If the Executive Director determines that the proposal does not adequately represent the agreement reached by the consulting parties, it may be returned to the Agency Official, or a Memorandum of Agreement revising the proposal may be submitted to the Agency Official and the State Historic Preservation Officer. As appropriate other parties in interest may be invited by the consulting parties to indicate their concurrence with the proposal or to be a signatory to the Agreement.

(2) *Review of Memorandum of Agreement.* Upon receipt of an executed Memorandum of Agreement, the Chairman shall institute a 30-day review period. Unless the Chairman notifies the Agency Official that the matter has been placed on the agenda for consideration at a Council meeting, the Agreement shall become final when ratified by the Chairman or upon the expiration of the 30-day review period with no action taken. Copies will be provided to signatories and notice of executed Memoranda of Agreement shall be published in the FEDERAL REGISTER. The Memorandum of Agreement should be included in the final environmental impact statement prepared pursuant to the National Environmental Policy Act.

(3) *Effect of Memorandum of Agreement.* Agreements duly executed in accordance with these regulations shall constitute the comments of the Council and shall evidence satisfaction of the Federal agency's responsibilities for the proposed undertaking under Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations. Failure to carry out the terms of a Memorandum of Agreement requires that the Federal agency again request the Council's comments in accordance with these regulations. In such instances, until the Council issues its comments under these regulations the Agency Official shall not take or sanction any action or make any irreversible or irretrievable commitment that could result in an adverse effect with respect to National Register or eligible properties covered by the Agreement or that would foreclose the Council's consideration of modifications or alternatives to the proposed undertaking that could avoid or mitigate the adverse effect.

(4) *Amendment of a Memorandum of Agreement.* If a signatory determines that the terms of the Memorandum of Agreement cannot be met or believes a change is necessary, the signatory shall immediately request the consulting parties to consider an amendment of the Agreement. Amendments will be executed in the same manner as the original Agreement.

(5) *Report on Memorandum of Agreement.* Within 90 days after carrying out the terms of the Agreement, the Agency Official shall report to all signatories on the actions taken.

(d) *Council Meetings.* The Council does not hold formal administrative hearings to develop its comments under these regulations. Reports and statements will be presented to the Council in open session in accordance with a prearranged agenda. Regular meetings of the Council generally occur quarterly.

(1) *Response to Recommendation for Consideration at Council Meeting.* Upon receipt of a notice and recommendation from the Executive Director concerning consideration of a proposed undertaking at a Council meeting, the Chairman shall determine within 15 days whether or not the undertaking will be considered and shall notify the Executive Director, the Agency Official, and the State Historic Preservation Officer of his decision. The Agency Official shall and the State Historic Preservation Officer should provide such reports and information as may be required to assist the Chairman in this determination.

If the Chairman decides against consideration of the undertaking at a Council meeting, a written summary of the undertaking, any recommendations for action by the Federal agency, and the decision shall be sent to each member of the Council. The Chairman shall also notify the Agency Official and the State Historic Preservation Officer and other parties in interest of the decision. If three members of the Council object within 10 days of the Chairman's decision, the undertaking shall be scheduled for consideration at a Council meeting. Unless three members of the Council object, the chairman shall notify the Agency Official, the State Historic Preservation Officer, and other parties in interest in writing that the undertaking may proceed. Such notice shall be evidence of satisfaction of the Federal agency's responsibilities for the proposed undertaking under Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations.

(2) *Decision to Consider the Undertaking.* When the Council will consider an undertaking at a meeting, the Chairman shall either designate five members as a panel to hear the matter on behalf of the full Council, or schedule the matter for consideration by the full Council.

(i) A panel shall consist of three non-Federal members, one as Chairman; and two Federal members, neither of whom shall represent the Federal agency involved in the undertaking. The panel shall meet to consider the undertaking within 30 days of the Chairman's decision unless the Agency Official agrees to a longer time.

(ii) The full Council will consider an undertaking at the next regularly scheduled meeting and no less than 60 days from the date of the Chairman's decision. In exceptional cases the Chairman may schedule the matter for consideration at a special meeting of the full Council to be held less than 60 days from the date of the decision.

(iii) Prior to any panel or full Council consideration of a matter, the Chairman will notify the Agency Official and the State Historic Preservation Officer, and other parties in interest of the date on which the undertaking will be considered. The Executive Director, the Agency Official, and the State Historic Preservation Officer shall prepare reports in accordance with § 800.13. Reports required from the Agency Official and the State Historic Preservation Officer must be received by the Executive Director at least 21 days before any meeting. Failure by the Federal agency to submit its report may result in postponement of consideration of the undertaking.

(3) *Meeting Notice.* Generally, 21 days notice of all meetings involving Council review of undertakings in accordance with these regulations shall be given by publication in the FEDERAL REGISTER. In exceptional cases, no less than 7 days notice shall be given by publication in the FEDERAL REGISTER.

(4) *Statements to the Council.* An agenda shall provide for oral statements from the Executive Director; the Agency Official; other parties in interest; the Secretary of the Interior; the State Historic Preservation Officer; representatives of national, State, or local units of government, and interested public and private organizations and individuals. Parties wishing to make oral remarks should notify the Executive Director at least two days in advance of the meeting. Parties wishing to have their statements distributed to Council members prior to the meeting should send copies of the statements to the Executive Director at least 7 days in advance.

(5) *Comments of the Council.* The written comments of the Council will be issued within 15 days after a meeting. Comments shall be made to the head of the Federal agency requesting comment or having responsibility for the undertaking. Immediately after the comments are made to the Federal agency, the comments of the Council will be forwarded to the President and Congress as a special report under authority of Section 202(b) of the Act and a notice of availability will be published in the FEDERAL REGISTER. The comments of the Council shall be available to the State Historic Preservation Officer, other parties in interest, and the public upon receipt of the comments by the head of the Federal Agency. The comments of the Council should be included in the final environmental impact statement prepared pursuant to the National Environmental Policy Act.

(6) *Review of Panel Decision.* Upon receipt of the panel's comments after a meeting, the head of the Federal agency shall take these comments into account in reaching a decision in regard to the proposed undertaking. If the agency determines not to follow the panel's comments, the Agency Official shall immediately provide written notice of this decision to the Council. The Chairman may convene a meeting of the full Council to consider the matter within 30 days of receipt of such notice. In the interim period the Agency Official shall not take or sanction any action or make any irreversible or irretrievable commitment that could result in an adverse effect on the National Register or eligible property or that would foreclose the Council's consideration of modifications or alternatives to the proposed undertaking that could avoid or mitigate the adverse effect. If the Chairman decides against consideration of the proposed undertaking, the consulting parties shall be immediately notified and the undertaking may proceed.

(7) *Agency Action in Response to Council Comments.* Upon receipt of the Council's comments after a meeting, the head of the Federal agency shall take these comments into account in reaching a final decision in regard to the proposed undertaking. When a final decision regarding the proposed undertaking is reached by the Federal agency, the Agency Official shall submit a written report to the Council describing the actions taken by the Federal Agency in response to the Council's comments; the actions taken by other parties pursuant to the actions of the Federal Agency; and the effect that such actions will have on the affected National Register or eligible property. Receipt of this Report by the Chairman shall be evidence that the agency has satisfied its responsibilities for the proposed undertaking under Section 106 of the Act, Section 2(b) of the Executive Order and these regulations. The Council may issue a final report to the President and Congress under authority of Section 202(b) of the Act describing the actions taken by the agency in response to the Council's comments including recommendations for changes in Federal policy and programs, as appropriate.

(8) *Continuing Review Jurisdiction.* When the Council has met and commented upon an undertaking that will require subsequent site-specific undertakings by a Federal agency, the Council's comment extends only to the undertaking as reviewed. The Agency Official shall ensure that subsequent actions related to the undertaking that have not been considered by the Council will be submitted to the Council for review in accordance with these regulations.

§ 800.7 Resources discovered during construction.

(a) *Federal Agency Responsibilities.* If a Federal agency has previously met its responsibilities for identified National Register and eligible properties under Section 106 of the Act, Section 2(b) of the Executive Order, these regulations, and the National Environmental Policy Act (42 U.S.C. 4321 et seq.), and an Agency Official finds or is notified after contruction has started that an undertaking will have an effect on a previously unidentified National Register or eligible property, the Federal agency may fulfill its responsibilities under Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations, by complying with the requirements of the Archeological and Historic Preservation Act (16 U.S.C. 469(a)) as implemented by the Secretary, unless the Secretary determines that the significance of the property, the effect, and any proposed mitigation actions warrant Council consideration. If the Secretary determines the Council's comments are warranted, the Agency Official shall request the comments of the Council.

(b) *Council Comments.* Within 30 days of receipt of a request for comments from an Agency Official under this section, the Executive Director, with the concurrence of the Chairman, shall transmit comments on behalf of the Council to the Agency Official or the Chairman shall convene a meeting of the Council pursuant to § 800.6.

FEDERAL PROGRAM COORDINATION

§ 800.8 Programmatic Memoranda of Agreement.

(a) *Application.* At the request of an Agency Official, the Council will consider execution of a Programmatic Memorandum of Agreement to fulfill an agency's responsibilities under Section 106 of the Act and Section 2(b) of the Executive Order for a particular program or class of undertakings that would otherwise require numerous individual requests for comments under these regulations. Within 30 days after the request, the Executive Director will notify the agency official whether a Programmatic Memoranda of Agreement may be used. Generally, Programmatic Memorandum of Agreement may be used in the following types of situations:

(1) Non-site-specific undertakings, including Federal approval of State plans pursuant to Federal legislation, development of comprehensive or area-wide plans, agency recommendations for legislation, and the establishment or modification of regulations and planning guidelines.

(2) Undertakings that are repetitive in nature and have essentially the same effect on National Register or eligible properties.

(3) Programs that are designed to further the preservation and enhancement of National Register or eligible properties.

(4) Programs with statutory time limits for project application and approval that would not permit compliance with these regulations in the normal manner.

(b) *Consultation Process.* Upon determination by the Executive Director that a Programmatic Memorandum of Agreement is appropriate, the Agency Official and the Executive Director shall consult to develop a Programmatic Memorandum of Agreement. When the Agreement will affect a particular State or States, the appropriate State Historic Preservation Officer may be a party to the consultation. When the Agreement involves issues national in scope, the President of the National Conference of State Historic Preservation Officers or a designated representative may be a party to the consultation. The Executive Director may invite other parties, including other Federal agencies with responsibilities which may be affected by the Agreement, to participate in the consultation and may hold a Public Information Meeting (see § 800.6(b)(3)) on the proposed Agreement.

(c) *Preparation of the Agreement.* It shall be the responsibility of the Executive Director to prepare each Agreement. At least 30 days before executing an Agreement, the Council shall publish notice of the proposed Agreement in the FEDERAL REGISTER inviting comments from Federal, State, and local agencies and the public. The Council will make copies available to interested parties and to appropriate A-95 clearinghouses.

(d) *Execution of the Agreement.* After consideration of comments received and completion of any necessary revisions, the Executive Director, the Agency Official, and other parties, if appropriate, shall sign the Agreement and it shall be sent to the Chairman for ratification.

(e) *Chairman's Review.* Upon receipt of a signed Agreement, the Chairman shall review the Agreement and within 30 days shall take one of the following actions:

(1) Ratify the Agreement, at which time it will take effect.

(2) Submit the Agreement to the full Council for approval.

(3) Disapprove the Agreement.

(f) *Effect of the Agreement.* An approved Programmatic Memorandum of Agreement shall constitute the comments of the Council on all individual undertakings carried out pursuant to the terms of the Agreement and, unless otherwise provided by the Agreement, shall satisfy the agency's responsibilities under Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations for all undertakings carried out in accordance with the Agreement.

(g) *Notice.* Notice of an approved Programmatic Agreement shall be published by the Council in the FEDERAL REGISTER. Copies shall be distributed through appropriate A-95 clearinghouses and the consulting parties shall make copies readily available to the public. The Programmatic Memorandum of Agreement should be included in the final environmental impact statement prepared pursuant to the National Environmental Policy Act.

(h) *Term.* Unless otherwise provided by the Agreement, duly executed Programmatic Memorandum of Agreement shall remain in effect until revoked by any one of the signatories. The Agency Official shall submit a report annually to the Executive Director and other signatories on all actions taken pursuant to the Agreement, including any recommendations for modification or termination of the Agreement. The Executive Director and other signatories shall review the report and determine whether modification or termination of the Agreement is appropriate.

§ 800.9 Coordination With Agency Requirements Under the National Environmental Policy Act (42 U.S.C. 4321 et seq.).

Section 101(b)(4) of the National Environmental Policy Act (NEPA) declares that one objective of national environmental policy is to "preserve important historic, cultural, and natural aspects of our national heritage and maintain, wherever possible, an environment which supports diversity and variety of individual choice." In order to meet this objective, Federal agencies should coordinate NEPA compliance with the separate responsibilities of the National Historic Preservation Act and Executive Order 11593 to ensure that historic and cultural properties are given proper consideration in the preparation of environmental assessments and environmental impact statements. Agency obligations pursuant to the National Historic Preservation Act and Executive Order 11593 are independent from NEPA requirements and must be complied with even when an environmental impact statement is not required. Agencies should also be aware that the threshold for compliance with Section 106 and the Executive Order is less than that for preparation of an environmental impact statement. The former applies to any Federal, federally assisted or federally licensed undertaking having an effect on a National Register or eligible property, while the latter extends only to major Federal actions significantly affecting the human environment. Where both NEPA and the Act or Executive Order are applicable, the Council on Environmental Quality, in its National Environmental Policy Act—Regulations (40 CFR 1502.25), directs that draft environmental impact statements prepared under Section 102(2)(C) of NEPA shall, to the fullest extent possible, be prepared with and integrated with other environmental impact analyses and related surveys and studies required by other authorities—such as the National Historic Preservation Act and Executive Order 11593. Preparation of a draft environmental impact statement may fulfill the requirements for reports and documentation under these authorities.

Circulation of the statement for comment pursuant to Section 102(2)(C) of NEPA shall constitute a request for Council comments under Section 800.4 of these regulations if Federal agencies so request in cover letters circulated with draft environmental impact statements. To coordinate the independent responsibilities of the Act and NEPA, Federal agencies should undertake compliance with these regulations whenever National Register or eligible properties may be affected by an undertaking. The following subsections indicate the appropriate means of coordinating the substance and timing of agency compliance with NEPA, Section 106, and Section 2(b). The Council will review agency environmental impact statements in accordance with this section. Adherence to these provisions will provide Federal agencies with an adequate record of the consideration of National Register and eligible properties during the planning process and will facilitate the production of a single document to meet the requirements of NEPA, Section 106, Executive Order 11593, and these regulations.

(a) It is normally intended that the Section 106/Executive Order commenting period run concurrently with the NEPA review process. Initiation of the consideration of historic and cultural resources should coincide with the initiation of other environmental reviews. To the maximum extent possible, agencies should reflect the status of compliance with Section 106, the Executive Order, and these regulations in all documents prepared under NEPA (environmental assessments, draft environmental impact statements, and final environmental impact statements) to provide the public with the fullest and most complete information available on effects on historic and cultural resources and alternatives to reduce those effects. If the commenting process under Section 106 and the Executive Order is not completed before the final environmental impact statement is issued, as with undertakings where subsequent design stage reviews occur, agencies should include the council's comments in any supplemental statement that is prepared pursuant to NEPA.

(b) Federal agencies should initiate compliance with Section 106 of the Act and the Executive Order in accordance with these regulations during initial environmental assessments that are undertaken to meet the requirements of NEPA and agency environmental procedures. In any event, this should occur no later than during the preparation of the draft environmental impact statement. Identification of National Register and eligible properties should be carried out in accordance with § 800.4 of these regulations. Potential effects should then be evaluated in accordance with the Criteria of Effect and Adverse Effect in § 800.3 of these regulations. The environmental assessment and the draft environmental impact statement should fully describe any National Register or eligible properties within the area of the undertaking's potential environmental impact and the nature of the undertaking's effect on them.

(c) If evaluation of the effect resulted in a Determination of No Effect or No Adverse Effect under § 800.4, that finding, along with supporting documentation, should be included or referenced in the environmental assessment and the draft environmental impact statement.

(d) If evaluation of the effect resulted in a Determination of Adverse Effect, that finding and a copy of the agency's request for the Council's comments in accordance with § 800.4(d)(1) of these regulations should be included in or referenced in the environmental assessment and the draft environmental impact statement. Agencies should include all available relevant information on National Register and eligible properties, the effects of the undertaking and alternative courses of action so that the draft environmental impact statement can be submitted as the preliminary case report under § 800.13(b) of these regulations. In some instances, the Section 106/Executive Order commenting process will be completed prior to issuance of a draft environmental impact statement. In that event, the comments of the Council should be included in the draft.

(e) Completion of the Council commenting process in accordance with these regulations should precede issuance of the final environmental impact statement. Comments of the Council obtained pursuant to § 800.6 or § 800.8 of these regulations should be incorporated into the final statement.

(f) The Council, in its review of environmental impact statements for undertakings that affect National Register or eligible properties, will look for evidence of proper compliance with Section 106 of the Act, Section 2(b) of the Executive Order, and these regulations. The Council's views on the agency's compliance with those authorities will be included in its comments on environmental impact statements.

§ 800.10 Coordination with the Presidential Memorandum on Environmental Quality and Water Resources Management.

Federal Agencies with water resources responsibilities shall, not later than three months after publication of these regulations as finally adopted in the FEDERAL REGISTER, publish procedures to implement these regulations as required by the Presidential Memorandum on Environmental Quality and Water Resources Management. Each agency shall consult with the Council while developing its procedures and shall provide an opportunity for public review and comment on their proposed regulations. Agency procedures shall be effective when the Chairman approves them as conforming to the Presidential Memorandum and these regulations. Agency procedures must at a minimum include acceptable measures to prevent or mitigate losses of historic or cultural resources and provisions to insure that all projects not yet constructed will comply with these regulations. Additionally, such procedures shall prescribe a clear way to identify funding for environmental mitigation in an agency's appropriation requests. The procedures shall be approved by the Chairman within 60 days if they are consistent with these regulations. Once in effect they shall be filed with the Council and made readily available to the public. Agencies are also encouraged to publish explanatory guidance for the procedures.

§ 800.11 Counterpart regulations.

Individual Federal agencies may, in accordance with Section 1(3) of the Executive Order, the President's Memorandum on Environmental Quality and Water Resources Management, and these regulations, choose to adopt counterpart regulations related to their specific programs and authorities to assist in meeting their responsibilities under Section 106 of the Act and Section 2(b) of the Executive Order.

(a) Responsibilities of individual Federal agencies pursuant to § 800.4 may be met by counterpart regulations jointly drafted by that agency and the Executive Director and approved by the Chairman. The Federal agency shall provide ample opportunity for public participation in the development of such counterpart regulations, including publication in the FEDERAL REGISTER as proposed and final rule making with provision for a minimum 60 day period for public comment. Once in effect such counterpart regulations may, as appropriate, supercede the requirements of § 800.4. The Federal agency shall file approved counterpart regulations with the Council and shall make them readily available to the public.

(b) Counterpart regulations may include:

(1) A definition of undertaking as it applies to that agency's particular activities and programs,

(2) Methods to identify National Register and eligible properties for each class of undertakings,

(3) Methods to evaluate effects on National Register or eligible properties,

(4) Authorization for non-Federal participation in the consultation process, and

Standards, guidelines and other measures to ensure avoidance or mitigation of adverse effects on National Register and eligible properties for each class of undertakings.

(c) To the maximum extent possible, counterpart regulations developed pursuant to this section should be intergrated with agency regulations for the National Environmental Policy Act.

OTHER PROVISIONS

§ 800.12 Investigation of threats to National Register and eligible properties.

(a) The Council is frequently advised by State Historic Preservation Officers and others of undertakings that threaten National Register or eligible properties and that appear to involve a *Federal agency. In order to protect* these properties, the Executive Director investigates these matters, generally by writing to the Federal agency that appears to be involved in the undertaking. Federal agencies should respond to these inquiries within 30 days. If there is Federal involvement in the undertaking, the agency shall fulfill its responsibilities under these regulations.

(b) The Council will exercise its authority to comment to Federal agencies under these regulations in certain special situations even though written notice that an undertaking will have an adverse effect has not been received.

§ 800.13 Reports to the Council.

In order to meet responsibilities under these regulations, the Council prescribes that certain reports and documents be made available to it. The content of such reports is set forth below. The purpose is to provide sufficient information for the Council to evaluate the significance of affected National Register and eligible properties, understand the objectives and requirements of the undertaking, assess the effect in terms of the criteria specified in these regulations, and analyze the feasibility and prudence of alternatives. The Council further recognizes that the Act requires that National Register and eligible properties should be preserved "as a living part of our community life and development," and considers those elements in an undertaking that have relevance beyond historical and cultural concerns. To assist it in weighing the public interest, the Council seeks information not only bearing upon physical, esthetic, or environmental effects but also information concerning economic, social, and other benefits or detriments that will result from the undertaking. Agencies should consider these reports in the context of their compliance with the National Environmental Policy Act and incorporate their content in environmental assessments, draft environmental impact statements and final environmental impact statements as specified in § 800.9.

(a) *Documentation for Determination of No Adverse Effect.* Adequate documentation of a Determination of No Adverse Effect pursuant to § 800.4 should include the following information:

(1) A description of the agency's involvement with the proposed undertaking with citations of the agency's program authority and applicable implementing regulations, procedures, and guidelines;

(2) A description of the proposed undertaking including, as appropriate, photographs, maps, drawings, and specifications;

(3) A list of National Register and eligible properties that will be affected by the undertaking, including a description of the property's physical appearance and significance;

(4) A brief statement explaining why each of the Criteria of Adverse Effect (See Section 800.3) was found inapplicable;

(5) Written views of the State Historic Preservation Officer concerning the Determination of No Adverse Effect, if available; and,

(6) An estimate of the cost of the undertaking, identifying Federal and non-Federal shares.

(b) *Preliminary Case Reports.* Preliminary Case Reports should be submitted with a request for comments pursuant to Section 800.4 and should include the following information:

(1) A description of the agency's involvement with the proposed undertaking with citations of the agency's program authority and applicable implementing regulations, procedures, and guidelines;

(2) The status of this project in the agency's approval process;

(3) The status of this project in the agency's National Environmental Policy Act compliance process and the target date for completion of all environmental responsibilities;

(4) A description of the proposed undertaking including, as appropriate, photographs, maps, drawings, and specifications;

(5) A description of the National Register or eligible properties affected by the undertaking, including a description of the properties' physical appearance and significance;

(6) A brief statement explaining why any of the Criteria of Adverse Effect (See § 800.3) apply;

(7) Written views of the State Historic Preservation Officer concerning the effect on the property, if available;

(8) The views of other Federal agencies, State and local governments, and the other groups or individuals, when known;

(9) A description and analysis of alternatives that would avoid the adverse effects;

(10) A description and analysis of alternatives that would mitigate the adverse effects; and,

(11) An estimate of the cost of the undertaking, identifying Federal and non-Federal shares;

(c) *Reports for Council Meeting.* Consideration of an undertaking by either the full Council or a panel pursuant to § 800.6 is based on reports from the Executive Director, the Agency Official, the Secretary of the Interior, the State Historic Preservation Officer, and others. The reports consist of the following:

(1) *Secretary of the Interior's Report.* The report from the Secretary shall include a verification of the legal and historical status of the property and an assessment of the historical, architectural, archeological, or cultural significance of the property.

(2) *Agency Official's Report.* The report from the Agency Offical requesting comments shall include a general discussion and chronology of the proposed undertaking; an account of the steps taken to comply with the National Environmental Policy Act (NEPA); any relevant supporting documentation in studies that the agency has completed; an evaluation of the effect of the undertaking upon the property, with particular reference to the impact on the historical, architectural, archeological, and cultural values; steps taken or proposed by the agency to avoid or mitigate adverse effects of the undertaking; a thorough discussion of alternate courses of action; and an analysis comparing the advantages resulting from the undertaking with the disadvantages resulting from the adverse effects on National Register or eligible properties. The Agency Official shall arrange for the submission and presentation of any report by a grantee, permittee, licensee, or other party receiving Federal assistance or approval to carry out the undertaking.

(3) *Other Federal Agency Reports.* A report from any other Federal agency involved in the undertaking or a related action that affects the property in question, including a general description and chronology of that agency's involvement and its relation to the undertaking being considered by the Council.

(4) *State Historic Preservation Officer's Report.* A report from the State Historic Preservation Officer should include an assessment of the significance of the property within the State preservation program; an evaluation of the effect of the undertaking upon the property and its specific components; an evaluation of known alternate courses of action; a discussion of present or proposed participation of State and local agencies or organizations in preserving or assisting in preserving the property; an indication of the support or opposition of units of government and public and private agencies and organizations within the State; and the recommendation of the State Historic Preservation Officer.

(5) *Executive Director's Report.* A report from the Executive Director shall include a description of the actions taken pursuant to these regulations, an evaluation of the effect of the undertaking on the property, a review of any known alternate courses of action, an analysis comparing the advantages resulting from the undertaking with the disadvantages resulting from the adverse effects on Na-

tional Register or eligible properties and recommendations for Council action.

(6) *Other Reports.* The Council will consider other pertinent reports, statements, correspondence, transcripts, minutes, and documents received from any and all parties, public or private. Reports submitted pursuant to this section should be received by the Council at least 7 days prior to a Council meeting.

§ 800.14 Supplementary Guidance.

The Executive Director may issue further guidance to interpret these regulations to assist Federal agencies and State Historic Preservation Officers in meeting their responsibilities. The guidelines are for informational purposes only and will be published in the FEDERAL REGISTER and will be readily available to the public.

§ 800.15 Public Participation.

The Council encourages maximum public participation in the review process under these regulations. The Council, Federal agencies, and State Historic Preservation Officers should seek assistance from the public including other Federal agencies, units of local and State government, public and private organizations, individuals and federally recognized Indian tribes in evaluating National Register and eligible properties, determining effect, and developing alternatives to avoid or mitigate an adverse effect. The public has considerable information available that could assist Federal agencies, the State Historic Preservation Officer and the Council in meeting their responsibilities under these regulations. The Council especially urges that Federal agencies make every effort to involve grantees, permittees, licensees, and other parties in interest in the consultation process. To this end, the Council, the Agency Official, and the State Historic Preservation Officer should:

(a) Make readily available, to the extent possible, documents, materials, and other information and data concerning the undertaking and effects on National Register and eligible properties that may be of interest to the public. Such information should be made available within the limits of the Freedom of Information Act (5 U.S.C. 552) and need not necessarily include information on budget, financial, personnel, and other proprietary matters or the specific location of archeological sites. Material to be made available to the public by the agency and the State Historic Preservation Officer should be provided to the public at the minimum cost permissible.

(b) Make the public aware of Public Information Meetings (§ 800.6(b)(3)), full or panel Council meetings (§ 800.6(d)), and the availability of other information related to the review process under these regulations such as a Determination of No Effect, a Determination of No Adverse Effect, a Memorandum of Agreement (See § 800.6(c)) or a Programmatic Memorandum of Agreement (See § 800.8). The purpose of such notice is to inform persons, agencies, and organizations that may be interested or affected by the proposed undertaking of the opportunity to participate in the review process under these regulations. This may include:

(1) Mailing notice to those who have requested it on an individual undertaking or Programmatic Memorandum of Agreement.

(2) Use of notice in local newspaper, local media, and newsletters that may be expected to reach potentially interested persons.

(3) Posting of notice on- and off-site in the area where the undertaking is proposed to be located.

(c) Solicit relevant information from the public during the identification of National Register and eligible properties, the evaluation of effects, and the consideration of alternatives.

(d) Hold or sponsor public meetings on proposed undertakings and make diligent efforts to include the public.

[FR Doc. 79-3248 Filed 1-29-79; 8:45 am]

TAB J
WATER RESOURCES COUNCIL

Section 13 of the Federal Nonnuclear Energy Research and Development Act of 1974, as amended
P.L. 93-577 (Section 13--as amended by P.L. 95-39)

WATER RESOURCE EVALUATION

Section 13. (a) The Water Resources Council shall undertake assessments of water resource requirements and water supply availability for any nonnuclear energy technology and any probable combinations of technologies which are the subject of Federal research and development efforts authorized by this Act, and the commercial development of which could have significant impacts on water resources. In the preparation of its assessments, the Council shall--

(1) utilize to the maximum extent practicable data on water supply and demand available in the files of member agencies of the Council;

(2) collect and compile any additional data it deems necessary for complete and accurate assessments;

(3) give full consideration to the constraints upon availability imposed by treaty, compact, court decree, State water laws, and water rights granted pursuant to State and Federal law;

(4) assess the effects of development of such technology on water quality;

(5) include estimates of cost associated with production and management of the required water supply, and the cost of disposal of waste water generated by the proposed facility or process;

(6) assess the environmental, social and economic impact of any change in use of currently utilized water resources that may be required by the proposed facility or process; and

(7) consult with the Council on Environmental Quality.

(b) For any proposed demonstration project which may involve a significant impact on water resources, the Administrator shall, as a precondition of Federal assistance to that project, request the Water Resources Council to prepare an assessment of water requirements and availability for such project. A report on the assessment shall be availability for such project. A report on the assessment shall be published in the Federal Register for public review thirty days prior to the expenditure of Federal funds on the demonstration.

(c) For any proposed Federal assistance for commercial application of energy technologies pursuant to this Act, the Water Resources Council shall, as a precondition of such Federal assistance, provide to the Administrator an assessment of the availability of adequate water resources for such commercial application and an evaluation of the environmental, social, and economic impacts of the dedication of water to such uses.

(d) Reports of assessments and evaluations prepared by the Council pursuant to subsections (a) and (c) shall be published in the Federal Register and at least ninety days shall be provided for public review and comment. Comments received shall accompany the reports when they are submitted to the Administrator and shall be available to the public.

(e) The Council shall include a broad survey and analysis of regional and national water resource availability for energy development in the biennial assessment required by section 102(a) of the Water Resources Planning Act (42 U.S.C. 1962d(a)).

(f) The Administrator shall, upon enactment of this subsection, be a member of the Council.

TAB K
RESOURCE CONSERVATION
AND RECOVERY

federal register

Monday
May 19, 1980

Environmental Protection Agency

Hazardous Waste

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

Subpart A—General

Sec.
260.1 Purpose, scope and applicability.
260.2 Availability of information, confidentiality of information.
260.3 Use of number and gender.

Subpart B—Definitions

260.10 Definitions.

Subpart C—Rulemaking Petitions

260.20 General.
260.21 Petitions for equivalent testing or analytical methods.
260.22 Petitions to amend Part 261 to exclude a waste produced at a particular facility.
Appendix I—Overview of Subtitle C Regulations

Authority: Secs. 1006, 2002(a), 3001 through 3007, 3010, and 7004, of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930, and 6974).

Subpart A—General

§ 260.1 Purpose, scope, and applicability.

(a) This part provides definitions of terms, general standards, and overview information applicable to Parts 260 through 265 of this Chapter.

(b) In this part: (1) Section 260.2 sets forth the rules that EPA will use in making information it receives available to the public and sets forth the requirements that generators, transporters, or owners or operators of treatment, storage, or disposal facilities must follow to assert claims of business confidentiality with respect to information that is submitted to EPA under Parts 260 through 265 of this Chapter.

(2) Section 260.3 establishes rules of grammatical construction for Parts 260 through 265 of this Chapter.

(3) Section 260.10 defines terms which are used in Parts 260 through 265 of this Chapter.

(4) Section 260.20 establishes procedures for petitioning EPA to amend, modify, or revoke any provision of Parts 260 through 265 of this Chapter and establishes procedures governing EPA's action on such petitions.

(5) Section 260.21 establishes procedures for petitioning EPA to approve testing methods as equivalent to those prescribed in Parts 261, 264, or 265 of this Chapter.

(6) Section 260.22 establishes procedures for petitioning EPA to amend Subpart D of Part 261 to exclude a waste from a particular facility.

§ 260.2 Availability of information; confidentiality of information.

(a) Any information provided to EPA under Parts 260 through 265 of this Chapter will be made available to the public to the extent and in the manner authorized by the Freedom of Information Act, 5 U.S.C. section 552, section 3007(b) of RCRA and EPA regulations implementing the Freedom of Information Act and section 3007(b), Part 2 of this Chapter, as applicable.

(b) Any person who submits information to EPA in accordance with Parts 260 through 265 of this Chapter may assert a claim of business confidentiality covering part or all of that information by following the procedures set forth in § 2.203(b) of this Chapter. Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in Part 2, Subpart B of this Chapter. However, if no such claim accompanies the information when it is received by EPA, it may be made available to the public without further notice to the person submitting it.

§ 260.3 Use of number and gender.

As used in Parts 260 through 265 of this Chapter:

(a) Words in the masculine gender also include the feminine and neuter genders; and

(b) Words in the singular include the plural; and

(c) Words in the plural include the singular.

Subpart B—Definitions

§ 260.10 Definitions.

(a) When used in Parts 260 through 265 of this Chapter, the following terms have the meanings given below: (1) "Act" or "RCRA" means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. section 6901 et seq.

(2) "Active portion" means that portion of a facility where treatment, storage, or disposal operations are being or have been conducted after the effective date of Part 261 of this Chapter and which is not a closed portion. (See also "closed portion" and "inactive portion".)

(3) "Administrator" means the Administrator of the Environmental Protection Agency, or his designee.

(4) "Aquifer" means a geologic formation, group of formations, or part of a formation capable of yielding a significant amount of ground water to wells or springs.

(5) "Authorized representative" means the person responsible for the overall operation of a facility or an operational unit (i.e., part of a facility), e.g., the plant manager, superintendent or person of equivalent responsibility.

(6) "Closed portion" means that portion of a facility which an owner or operator has closed in accordance with the approved facility closure plan and all applicable closure requirements. (See also "active portion" and "inactive portion".)

(7) "Confined aquifer" means an aquifer bounded above and below by

impermeable beds or by beds of distinctly lower permeability than that of the aquifer itself; an aquifer containing confined ground water.

(8) "Constituent" or "hazardous waste constituent" means a constituent which caused the Administrator to list the hazardous waste in Part 261, Subpart D, of this Chapter, or a constituent listed in Table 1 of § 261.24 of this Chapter.

(9) "Container" means any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled.

(10) "Contingency plan" means a document setting out an organized, planned, and coordinated course of action to be followed in case of a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

(11) "Designated facility" means a hazardous waste treatment, storage, or disposal facility which has received an EPA permit (or a facility with interim status) in accordance with the requirements of 40 CFR Parts 122 and 124 of this Chapter, or a permit from a State authorized in accordance with Part 123 of this Chapter, that has been designated on the manifest by the generator pursuant to § 262.20.

(12) "Dike" means an embankment or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials.

(13) "Discharge" or "hazardous waste discharge" means the accidental or intentional spilling, leaking, pumping, pouring, emitting, emptying, or dumping of hazardous waste into or on any land or water.

(14) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(15) "Disposal facility" means a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure.

(16) "EPA hazardous waste number" means the number assigned by EPA to each hazardous waste listed in Part 261, Subpart D, of this Chapter and to each characteristic identified in Part 261, Subpart C, of this Chapter.

(17) "EPA identification number" means the number assigned by EPA to each generator, transporter, and treatment, storage, or disposal facility.

(18) "EPA region" means the states and territories found in any one of the following ten regions:

Region I—Maine, Vermont, New Hampshire, Massachusetts, Connecticut, and Rhode Island.
Region II—New York, New Jersey, Commonwealth of Puerto Rico, and the U.S. Virgin Islands.
Region III—Pennsylvania, Delaware, Maryland, West Virginia, Virginia, and the District of Columbia.
Region IV—Kentucky, Tennessee, North Carolina, Mississippi, Alabama, Georgia, South Carolina, and Florida.
Region V—Minnesota, Wisconsin, Illinois, Michigan, Indiana and Ohio.
Region VI—New Mexico, Oklahoma, Arkansas, Louisiana, and Texas.
Region VII—Nebraska, Kansas, Missouri, and Iowa.
Region VIII—Montana, Wyoming, North Dakota, South Dakota, Utah, and Colorado.
Region IX—California, Nevada, Arizona, Hawaii, Guam, American Samoa, Commonwealth of the Northern Mariana Islands.
Region X—Washington, Oregon, Idaho, and Alaska.

(19) "Equivalent method" means any testing or analytical method approved by the Administrator under §§ 260.20 and 260.21.

(20) "Existing hazardous waste management facility" or "existing facility" means a facility which was in operation, or for which construction had commenced, on or before October 21, 1976. Construction had commenced if:

(i) The owner or operator has obtained all necessary Federal, State, and local preconstruction approvals or permits; and either
(ii)(*a*) A continuous physical, on-site construction program has begun, or
(*b*) The owner or operator has entered into contractual obligations—which cannot be cancelled or modified without substantial loss—for construction of the facility to be completed within a reasonable time.

(21) "Facility" means all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).

(22) "Federal agency" means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

(23) "Food-chain crops" means tobacco, crops grown for human consumption, and crops grown for feed for animals whose products are consumed by humans.

(24) "Freeboard" means the vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein.

(25) "Free liquids" means liquids which readily separate from the solid portion of a waste under ambient temperature and pressure.

(26) "Generator" means any person, by site, whose act or process produces hazardous waste identified or listed in Part 261 of this Chapter.

(27) "Ground water" means water below the land surface in a zone of saturation.

(28) "Hazardous waste" means a hazardous waste as defined in § 261.3 of this Chapter.

(29) "Inactive portion" means that portion of a facility which is not operated after the effective date of Part 261 of this Chapter. (See also "active portion" and "closed portion".)

(30) "Incinerator" means an enclosed device using controlled flame combustion, the primary purpose of which is to thermally break down hazardous waste. Examples of incinerators are rotary kiln, fluidized bed, and liquid injection incinerators.

(31) "Incompatible waste" means a hazardous waste which is unsuitable for:

(i) Placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or
(ii) Commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases.
(See Part 265, Appendix V, of this Chapter for examples.)

(32) "Individual generation site" means the contiguous site at or on which one or more hazardous wastes are generated. An individual generation site, such as a large manufacturing plant, may have one or more sources of hazardous waste but is considered a single or individual generation site if the site or property is contiguous.

(33) "In operation" refers to a facility which is treating, storing, or disposing of hazardous waste.

(34) "Injection well" means a well into which fluids are injected. (See also "underground injection".)

(35) "Inner liner" means a continuous layer of material placed inside a tank or container which protects the

construction materials of the tank or container from the contained waste or reagents used to treat the waste.

(36) "International shipment" means the transportation of hazardous waste into or out of the jurisdiction of the United States.

(37) "Landfill" means a disposal facility or part of a facility where hazardous waste is placed in or on land and which is not a land treatment facility, a surface impoundment, or an injection well.

(38) "Landfill cell" means a discrete volume of a hazardous waste landfill which uses a liner to provide isolation of wastes from adjacent cells or wastes. Examples of landfill cells are trenches and pits.

(39) "Land treatment facility" means a facility or part of a facility at which hazardous waste is applied onto or incorporated into the soil surface; such facilities are disposal facilities if the waste will remain after closure.

(40) "Leachate" means any liquid, including any suspended components in the liquid, that has percolated through or drained from hazardous waste.

(41) "Liner" means a continuous layer of natural or man-made materials, beneath or on the sides of a surface impoundment, landfill, or landfill cell, which restricts the downward or lateral escape of hazardous waste, hazardous waste constituents, or leachate.

(42) "Management" or "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste.

(43) "Manifest" means the shipping document originated and signed by the generator which contains the information required by Part 262, Subpart B, of this Chapter.

(44) "Manifest document number" means the serially increasing number assigned to the manifest by the generator for recording and reporting purposes.

(45) "Mining overburden returned to the mine site" means any material overlying an economic mineral deposit which is removed to gain access to that deposit and is then used for reclamation of a surface mine.

(46) "Movement" means that hazardous waste transported to a facility in an individual vehicle.

(47) "New hazardous waste management facility" or "new facility" means a facility which began operation, or for which construction commenced after October 21, 1976. (See also "Existing hazardous waste management facility".)

(48) "On-site" means the same or geographically contiguous property which may be divided by public or private right-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property.

(49) "Open burning" means the combustion of any material without the following characteristics:

(i) Control of combustion air to maintain adequate temperature for efficient combustion,

(ii) Containment of the combustion-reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion, and

(iii) Control of emission of the gaseous combustion products.

(See also "incineration" and "thermal treatment".)

(50) "Operator" means the person responsible for the overall operation of a facility.

(51) "Owner" means the person who owns a facility or part of a facility.

(52) "Partial closure" means the closure of a discrete part of a facility in accordance with the applicable closure requirements of Parts 264 or 265 of this Chapter. For example, partial closure may include the closure of a trench, a unit operation, a landfill cell, or a pit, while other parts of the same facility continue in operation or will be placed in operation in the future.

(53) "Person" means an individual, trust, firm, joint stock company, Federal Agency, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

(54) "Personnel" or "facility personnel" means all persons who work, at, or oversee the operations of, a hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of Parts 264 or 265 of this Chapter.

(55) "Pile" means any non-containerized accumulation of solid, nonflowing hazardous waste that is used for treatment or storage.

(56) "Point source" means any discernible, confined, and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

(57) "Publicly owned treatment works" or "POTW" means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a "State" or "municipality" (as defined by Section 502(4) of the CWA). This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(58) "Regional Administrator" means the Regional Administrator for the EPA Region in which the facility is located, or his designee.

(59) "Representative sample" means a sample of a universe or whole (e.g., waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole.

(60) "Run-off" means any rainwater, leachate, or other liquid that drains over land from any part of a facility.

(61) "Run-on" means any rainwater, leachate, or other liquid that drains over land onto any part of a facility.

(62) "Saturated zone" or "zone of saturation" means that part of the earth's crust in which all voids are filled with water.

(63) "Sludge" means any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant.

(64) "Solid waste" means a solid waste as defined in § 261.2 of this Chapter.

(65) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(66) "Storage" means the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere.

(67) "Surface impoundment" or "impoundment" means a facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well. Examples of surface impoundments are holding, storage,

settling, and aeration pits, ponds, and lagoons.

(68) "Tank" means a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural support.

(69) "Thermal treatment" means the treatment of hazardous waste in a device which uses elevated temperatures as the primary means to change the chemical, physical, or biological character or composition of the hazardous waste. Examples of thermal treatment processes are incineration, molten salt, pyrolysis, calcination, wet air oxidation, and microwave discharge. (See also "incinerator" and "open burning".)

(70) "Totally enclosed treatment facility" means a facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment. An example is a pipe in which waste acid is neutralized.

(71) "Transportation" means the movement of hazardous waste by air, rail, highway, or water.

(72) "Transporter" means a person engaged in the offsite transportation of hazardous waste by air, rail, highway, or water.

(73) "Treatment" means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

(74) "Underground injection" means the subsurface emplacement of fluids through a bored, drilled or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension. (See also "injection well".)

(75) "Unsaturated zone" or "zone of aeration" means the zone between the land surface and the water table.

(76) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(77) "Water (bulk shipment)" means the bulk transportation of hazardous waste which is loaded or carried on board a vessel without containers or labels.

(78) "Well" means any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

(79) "Well injection": (See "underground injection".)

Subpart C—Rulemaking Petitions

§ 260.20 General.

(a) Any person may petition the Administrator to modify or revoke any provision in Parts 260 through 265 of this Chapter. This section sets forth general requirements which apply to all such petitions. Section 260.21 sets forth additional requirements for petitions to add a testing or analytical method to Parts 261, 264 or 265. Section 260.22 sets forth additional requirements for petitions to exclude a waste at a particular facility from § 261.3 of this Chapter or the lists of hazardous wastes in Subpart D of Part 261.

(b) Each petition must be submitted to the Administrator by certified mail and must include:

(1) The petitioner's name and address;
(2) A statement of the petitioner's interest in the proposed action;
(3) A description of the proposed action, including (where appropriate) suggested regulatory language; and
(4) A statement of the need and justification for the proposed action, including any supporting tests, studies, or other information.

(c) The Administrator will make a tentative decision to grant or deny a petition and will publish notice of such tentative decision, either in the form of an advanced notice of proposed rulemaking, a proposed rule, or a tentative determination to deny the petition, in the **Federal Register** for written public comment.

(d) Upon the written request of any interested person, the Administrator may, at his discretion, hold an informal public hearing to consider oral comments on the tentative decision. A person requesting a hearing must state the issues to be raised and explain why written comments would not suffice to communicate the person's views. The Administrator may in any case decide on his own motion to hold an informal public hearing.

(e) After evaluating all public comments the Administrator will make a final decision by publishing in the **Federal Register** a regulatory amendment or a denial of the petition.

§ 260.21 Petitions for equivalent testing or analytical methods.

(a) Any person seeking to add a testing or analytical method to Parts 261, 264, or 265 of this Chapter may petition for a regulatory amendment under this section and § 260.20. To be successful, the person must demonstrate to the satisfaction of the Administrator that the proposed method is equal to or superior to the corresponding method prescribed in Parts 261, 264, or 265 of this Chapter, in terms of its sensitivity, accuracy, and precision (i.e., reproducibility).

(b) Each petition must include, in addition to the information required by § 260.20(b):

(1) A full description of the proposed method, including all procedural steps and equipment used in the method;
(2) A description of the types of wastes or waste matrices for which the proposed method may be used;
(3) Comparative results obtained from using the proposed method with those obtained from using the relevant or corresponding methods prescribed in Parts 261, 264, or 265 of this Chapter;
(4) An assessment of any factors which may interfere with, or limit the use of, the proposed method; and
(5) A description of the quality control procedures necessary to ensure the sensitivity, accuracy and precision of the proposed method.

(c) After receiving a petition for an equivalent method, the Administrator may request any additional information on the proposed method which he may reasonably require to evaluate the method.

(d) If the Administrator amends the regulations to permit use of a new testing method, the method will be incorporated in "Test Methods for the Evaluation of Solid Waste: Physical/Chemical Methods," SW-846, U.S. Environmental Protection Agency, Office of Solid Waste, Washington, D.C. 20460.

[Comment: This manual will be provided to any person on request, and will be available for inspection or copying at EPA headquarters or any EPA Regional Office.]

§ 260.22 Petitions to amend Part 261 to exclude a waste produced at a particular facility.

(a) Any person seeking to exclude a waste at a particular generating facility from the lists in Subpart D of Part 261 may petition for a regulatory amendment under this section and § 260.20. To be successful, the petitioner must demonstrate to the satisfaction of the Administrator that the waste produced by a particular generating facility does not meet any of the criteria under which the waste was listed as a hazardous waste and, in the case of an acutely hazardous waste listed under § 261.11(a)(2), that it also does not meet the criterion of § 261.11(a)(3). A waste which is so excluded may still, however, be a hazardous waste by operation of Subpart C of Part 261.

(b) The procedures in this section and § 260.20 may also be used to petition the Administrator for a regulatory amendment to exclude from § 261.3(a)(2)(ii) or (c), a waste which is described in those sections and is either a waste listed in Subpart D, contains a waste listed in Subpart D, or is derived from a waste listed in Subpart D. This exclusion may only be issued for a particular generating, storage, treatment, or disposal facility. The petitioner must make the same demonstration as required by paragraph (a) of this section, except that where the waste is a mixture of solid waste and one or more listed hazardous wastes or is derived from one or more hazardous wastes, his demonstration may be made with respect to each constituent listed waste or the waste mixture as a whole. A waste which is so excluded may still be a hazardous waste by operation of Subpart C of Part 261.

(c) If the waste is listed with codes "I", "C", "R", or "E" in Subpart D, the petitioner must show that demonstration samples of the waste do not exhibit the relevant characteristic defined in §§ 261.21, 261.22, 261.23, or 261.24 using any applicable test methods prescribed therein.

(d) If the waste is listed with code "T" in Subpart D, the petitioner must demonstrate that:

(1) The Demonstration samples of the waste do not contain the constituent (as defined in Appendix VII) that caused the Administrator to list the waste, using the appropriate test methods prescribed in Appendix III; or

(2) The waste does not meet the criterion of § 261.11(a)(3) when considering the factors in § 261.11(a)(3) (i) through (xi).

(e) If the waste is listed with the code "H" in Subpart D, the petitioner must demonstrate that the waste does not meet both of the following criteria:

(1) The criterion of § 261.11(a)(2).

(2) The criterion of § 261.11(a)(3) when considering the factors listed in § 261.11(a)(3) (i) through (xi).

(f) [Reserved for listing radioactive wastes.]

(g) [Reserved for listed infectious wastes.]

(h) Demonstration samples must consist of enough representative samples, but in no case less than four samples, taken over a period of time sufficient to represent the variability or the uniformity of the waste.

(i) Each petition must include, in addition to the information required by § 260.20(b):

(1) The name and address of the laboratory facility performing the sampling or tests of the waste;

(2) The names and qualifications of the persons sampling and testing the waste;

(3) The dates of sampling and testing;

(4) The location of the generating facility;

(5) A description of the manufacturing processes or other operations and feed materials producing the waste and an assessment of whether such processes, operations, or feed materials can or might produce a waste that is not covered by the demonstration;

(6) A description of the waste and an estimate of the average and maximum monthly and annual quantities of waste covered by the demonstration;

(7) Pertinent data on and discussion of the factors delineated in the respective criterion for listing a hazardous waste, where the demonstration is based on the factors in § 261.11(a)(3);

(8) A description of the methodologies and equipment used to obtain the representative samples;

(9) A description of the sample handling and preparation techniques, including techniques used for extraction, containerization and preservation of the samples;

(10) A description of the tests performed (including results);

(11) The names and model numbers of the instruments used in performing the tests; and

(12) The following statement signed by the generator of the waste or his authorized representative:

> I certify under penalty of law that I have personally examined and am familiar with the information submitted in this demonstration and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

(j) After receiving a petition for an exclusion, the Administrator may request any additional information which he may reasonably require to evaluate the petition.

(k) An exclusion will only apply to the waste generated at the individual facility covered by the demonstration and will not apply to waste from any other facility.

(l) The Administrator may exclude only part of the waste for which the demonstration is submitted where he has reason to believe that variability of the waste justifies a partial exclusion.

(m) The Administrator may (but shall not be required to) grant a temporary exclusion before making a final decision under § 260.20(d) whenever he finds that there is a substantial likelihood that an exclusion will be finally granted. The Administrator will publish notice of any such temporary exclusion in the **Federal Register**.

Appendix I.—Overview of Subtitle C Regulations

The Agency believes that there are many people who suspect, but are not sure, that their activities are subject to control under the RCRA Subtitle C rules. This appendix is written for these people. It is designed to help those who are unfamiliar with the hazardous waste control program to determine with which, if any, of the regulations they should comply.

Definition of Solid Waste

The first question which such a person should ask himself is: "Is the material I handle a solid waste?" If the answer to this question is "No", then the material is not subject to control under RCRA and, therefore, the person need not worry about whether he should comply with the Subtitle C rules.

Section 261.2 of this Chapter provides a definition of "solid waste" which expands the statutory definition of that term given in section 1004(27) of RCRA. This definition is diagrammed in Figure 1 below.

Figure 1 explains that all materials are either: (1) Garbage refuse, or sludge; (2) solid, liquid, semi-solid or contained gaseous material; or (3) something else. No materials in the third category are solid waste. All materials in the first category are solid waste. Materials in the second category are solid waste unless they are one of the five exclusions specified in § 261.4(a).

Definition of Hazardous Waste

If a person has determined that his material is a "solid waste", the next question he should ask is: "Is the solid waste I handle a hazardous waste?"

Hazardous waste is defined in § 261.3 of this chapter. Section 261.3 provides that, in general, a solid waste is a hazardous waste if: (1) It is, or contains, a hazardous waste listed in Subpart D of

Part 261 of this Chapter, or (2) the waste exhibits any of the characteristics defined in Subpart C of Part 261. However, Parts 260 and 261 also contain provisions which exclude (§§ 261.4(b), 260.20, and 260.22) certain solid wastes from the definition of "hazardous waste", even though they are listed in Subpart D or exhibit one or more of the characteristics defined in Subpart C. Figure 2 depicts the interplay of these special provisions with the definition of "hazardous waste". It presents a series of questions which a person should ask himself concerning his waste. After doing so, the person should be able to determine if the solid waste he handles is a hazardous waste.

Hazardous Waste Regulations

If this is the case, the person should look at Figure 3. Figure 3 depicts the special provisions specified in the final Part 261 rules for hazardous waste which:

1. Is generated by a small quantity generator
2. Is or is intended to be legitimately and beneficially used, re-used, recycled, or reclaimed
3. Is a sludge; is listed in Part 261, Subpart D; or is a mixture containing a waste listed in Part 261, Subpart D.

For each of these Groups, Figure 3 indicates with which Subtitle C regulations (if any) the person handling these wastes must comply. Figure 3 also explains that, if a person handles hazardous waste which is not included in any one of the above three categories, his waste is subject to the Subtitle C regulations diagrammed in Figure 4.

Figure 4 is a flowchart which identifies the three categories of activities regulated under the Subtitle C rules, and the corresponding set of rules with which people in each of these categories must comply. It points out that all people who handle hazardous waste are either: (1) Generators of hazardous waste, (2) transporters of hazardous waste, (3) owners or operators of hazardous waste treatment, storage, or disposal facilities, or (4) a combination of the above. Figure 4 indicates that all of these people must notify EPA of their hazardous waste activities in accordance with the Section 3010 Notification Procedures (see 45 FR 12746 *et seq.*), and obtain an EPA identification number.

It should be noted that people handling wastes listed in Subpart D of Part 261 who have filed, or who intend to file an application to exempt their waste from regulation under the Subtitle C rules, must also comply with the notification requirements of section 3010.

If a person generates hazardous waste, Figure 4 indicates that he must comply with the Part 262 rules. If he transports it, he must comply with the Part 263 rules. The standards in both these Parts are designed to ensure, among other things, proper recordkeeping and reporting, the use of a manifest system to track shipments of hazardous waste, the use of proper labels and containers, and the delivery of the waste to a permitted treatment, storage, or disposal facility.

If a person owns or operates a facility which treats, stores, or disposes of hazardous waste, the standards with which he must comply depend on a number of factors. First of all, if the owner or operator of a *storage* facility is also the person who generates the waste, and the waste is stored at the facility for less than 90 days for subsequent shipment off-site, then the person must comply with § 262.34 of the Part 262 rules.

All other owners or operators of treatment, storage, or disposal facilities must comply with either the Part 264 or the Part 265 rules. To determine with which of these sets of rules an owner or operator must comply, he must find out whether his facility qualifies for interim status. To qualify, the owner or operator must: (1) Have been treating, storing, or disposing of the hazardous waste, or commenced facility construction on or before October 21, 1976, (2) comply with the Section 3010 notification requirements, and (3) apply for a permit under Part 122 of this Chapter.

If the owner or operator has done all of the above, he qualifies for interim status, and he must comply with the Part 265 rules. These rules contain administrative requirements, monitoring and closure standards, and an abbreviated set of technical and closure and post-closure cost estimate requirements. The owner or operator must comply with these standards until final administrative disposition of his permit application is made. If a permit is issued to the owner or operator, he must then comply with the permit which will be based on the Part 264 rules.

If the owner or operator has not carried out the above three requirements, he does not qualify for interim status. Until he is issued a permit for his facility, the owner or operator must stop waste management operations (if any) at the facility, and send his hazardous waste (if any) to a facility whose owner or operator has interim status or to a storage facility following the Part 262 rules.

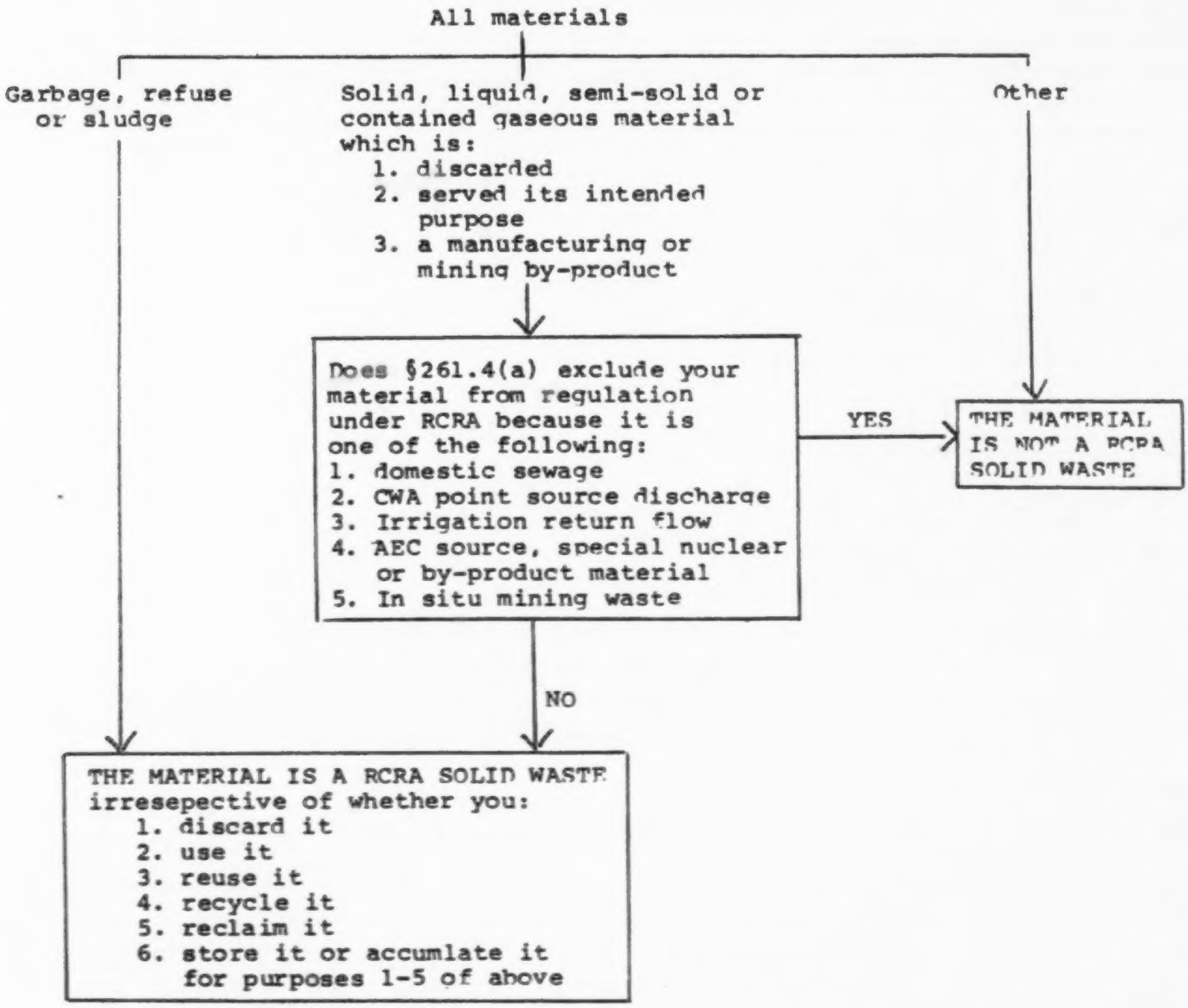
In order to apply for a permit, the owner or operator must comply with the procedures specified in Part 122 of this Chapter.

It should be noted that the Agency will be periodically revising the rules depicted in Figures 3 and 4. All persons are encouraged to write to EPA to verify that the regulations which they are reading are up-to-date. To obtain this verification, contact: Solid Waste Information, U.S. Environmental Protection Agency, 26 West St. Clair Street, Cincinnati, Ohio 45268 (513) 684-5362.

[FR Doc. 80-14306 Filed 5-16-80; 8:45 am]
BILLING CODE 6560-01-M

FIGURE 1

DEFINITION OF A SOLID WASTE



All materials

Garbage, refuse or sludge

Solid, liquid, semi-solid or contained gaseous material which is:
1. discarded
2. served its intended purpose
3. a manufacturing or mining by-product

Other

Does §261.4(a) exclude your material from regulation under RCRA because it is one of the following:
1. domestic sewage
2. CWA point source discharge
3. Irrigation return flow
4. AEC source, special nuclear or by-product material
5. In situ mining waste

THE MATERIAL IS NOT A RCRA SOLID WASTE

THE MATERIAL IS A RCRA SOLID WASTE irresepective of whether you:
1. discard it
2. use it
3. reuse it
4. recycle it
5. reclaim it
6. store it or accumlate it for purposes 1-5 of above

FIGURE 2

DEFINITION OF A HAZARDOUS WASTE

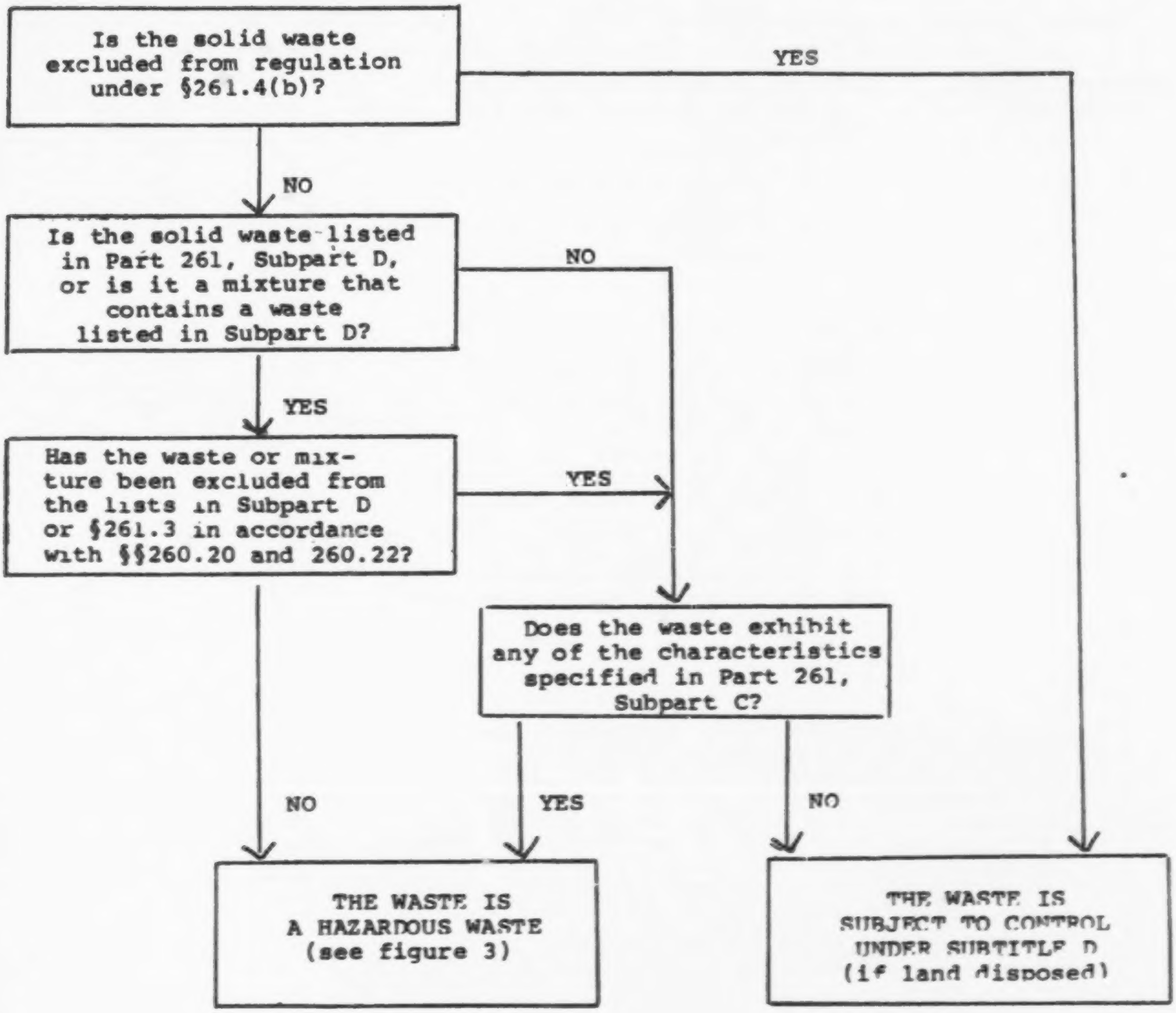

Is the solid waste excluded from regulation under §261.4(b)?
YES
NO
Is the solid waste listed in Part 261, Subpart D, or is it a mixture that contains a waste listed in Subpart D?
NO
YES
Has the waste or mixture been excluded from the lists in Subpart D or §261.3 in accordance with §§260.20 and 260.22?
YES
Does the waste exhibit any of the characteristics specified in Part 261, Subpart C?
NO
YES
NO
THE WASTE IS A HAZARDOUS WASTE (see figure 3)
THE WASTE IS SUBJECT TO CONTROL UNDER SUBTITLE D (if land disposed)

FIGURE 3

SPECIAL PROVISIONS FOR CERTAIN HAZARDOUS WASTE

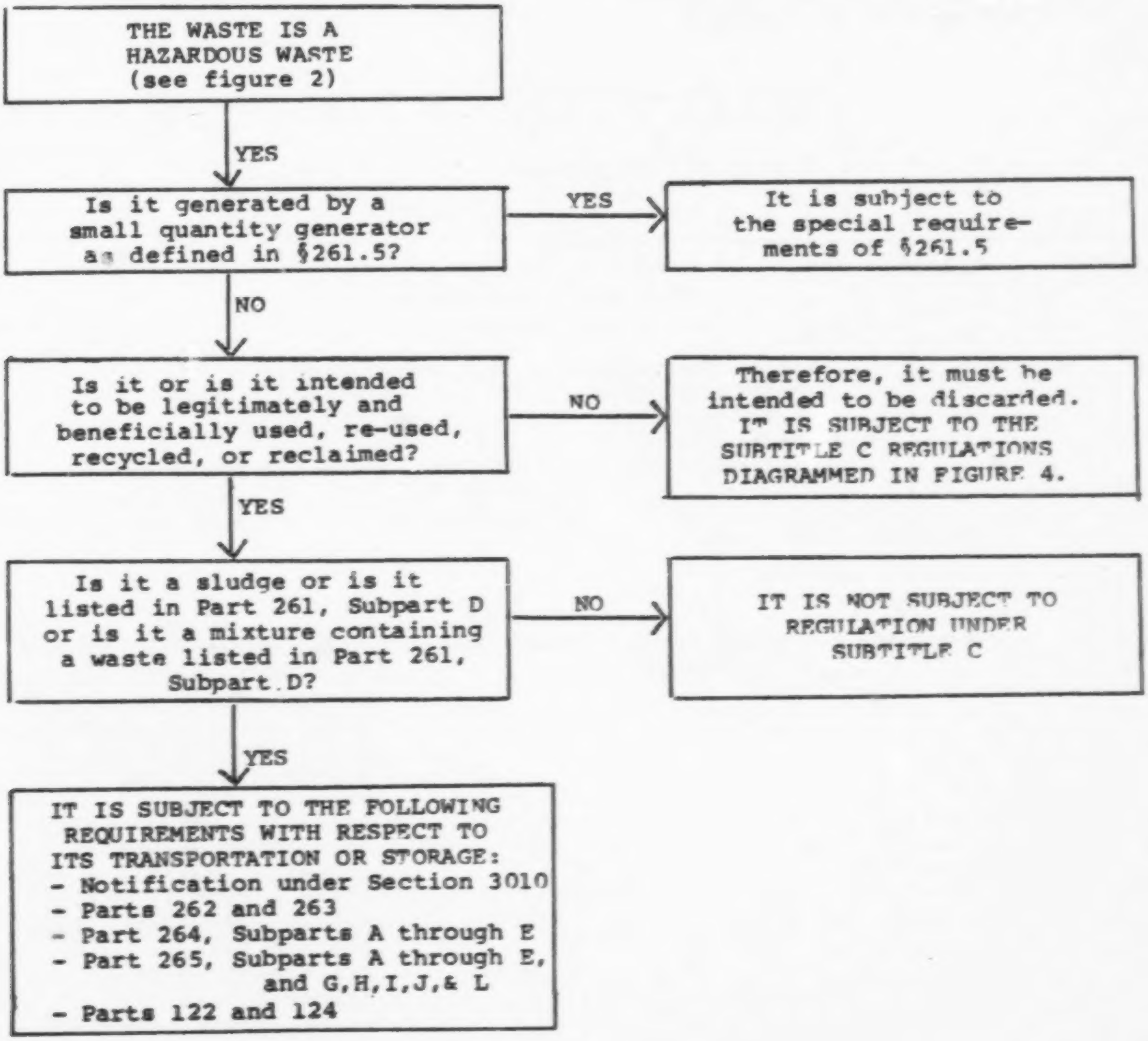
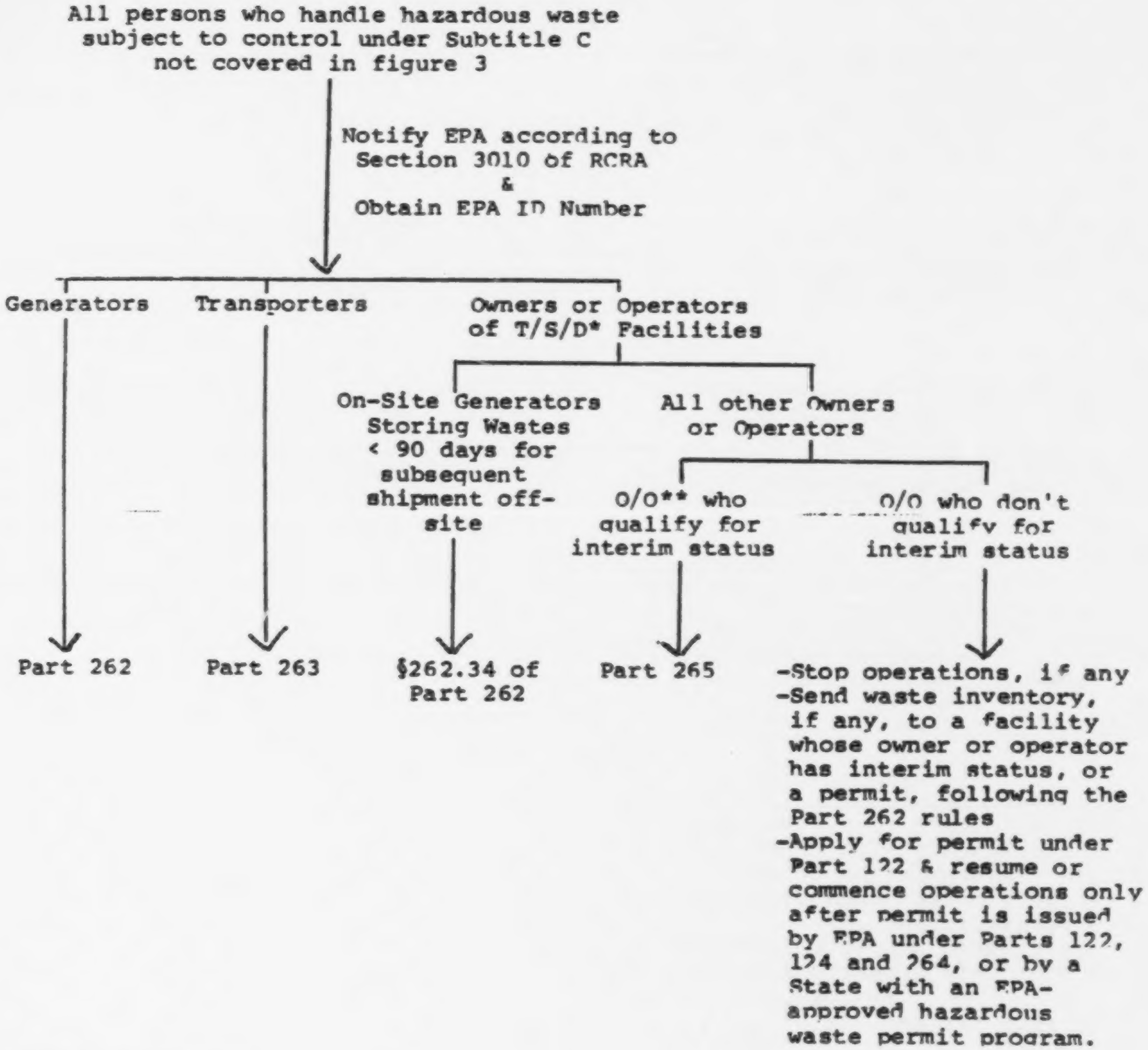

THE WASTE IS A HAZARDOUS WASTE (see figure 2)
YES
Is it generated by a small quantity generator as defined in §261.5?
YES
It is subject to the special requirements of §261.5
NO
Is it or is it intended to be legitimately and beneficially used, re-used, recycled, or reclaimed?
NO
Therefore, it must be intended to be discarded. IT IS SUBJECT TO THE SUBTITLE C REGULATIONS DIAGRAMMED IN FIGURE 4.
YES
Is it a sludge or is it listed in Part 261, Subpart D or is it a mixture containing a waste listed in Part 261, Subpart D?
NO
IT IS NOT SUBJECT TO REGULATION UNDER SUBTITLE C
YES
IT IS SUBJECT TO THE FOLLOWING REQUIREMENTS WITH RESPECT TO ITS TRANSPORTATION OR STORAGE:
- Notification under Section 3010
- Parts 262 and 263
- Part 264, Subparts A through E
- Part 265, Subparts A through E, and G,H,I,J,& L
- Parts 122 and 124

FIGURE 4

REGULATIONS FOR HAZARDOUS WASTE
NOT COVERED IN DIAGRAM 3


All persons who handle hazardous waste subject to control under Subtitle C not covered in figure 3
Notify EPA according to Section 3010 of RCRA & Obtain EPA ID Number
Generators
Transporters
Owners or Operators of T/S/D* Facilities
On-Site Generators Storing Wastes < 90 days for subsequent shipment off-site
All other Owners or Operators
O/O** who qualify for interim status
O/O who don't qualify for interim status
Part 262
Part 263
§262.34 of Part 262
Part 265

-Stop operations, if any
-Send waste inventory, if any, to a facility whose owner or operator has interim status, or a permit, following the Part 262 rules
-Apply for permit under Part 122 & resume or commence operations only after permit is issued by EPA under Parts 122, 124 and 264, or by a State with an EPA-approved hazardous waste permit program.

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* T/S/D stands for Treatment, Storage, or Disposal
** O/O stands for Owners or Operators

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PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

Subpart A—General

Sec.
261.1 Purpose and scope.
261.2 Definition of solid waste.
261.3 Definition of hazardous waste.
261.4 Exclusions.
261.5 Special requirements for hazardous waste produced by small quantity generators.
261.6 Special requirements for hazardous waste which is used, re-used, recycled or reclaimed.

Subpart B—Criteria for Identifying the Characteristics of Hazardous Waste and for Listing Hazardous Wastes

261.10 Criteria for identifying the characteristics of hazardous wastes.
261.11 Criteria for listing hazardous waste.

Subpart C—Characteristics of Hazardous Waste

261.20 General.
261.21 Characteristic of ignitability.
261.22 Characteristic of corrosivity.
261.23 Characteristic of reactivity.
261.24 Characteristic of EP toxicity.

Subpart D—Lists of Hazardous Wastes

261.30 General.
261.31 Hazardous wastes from non-specific sources.
261.32 Hazardous wastes from specific sources.
261.33 Discarded commercial chemical products and associated off-specification materials, containers and spill residues.

Appendices

Appendix I—Representative Sampling Methods
Appendix II—EP Toxicity Test Procedures
Appendix III—Chemical Analysis Test Methods
Appendix IV—[Reserved for Radioactive Waste Test Methods]
Appendix V—[Reserved for Infectious Waste Treatment Specifications]
Appendix VI—[Reserved for Etiologic Agents]
Appendix VII—Basis for Listing
Appendix VIII—Hazardous Constituents

Authority: Secs. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912, 6921 and 6922).

Subpart A—General

§ 261.1 Purpose and scope.

(a) This Part identifies those solid wastes which are subject to regulation as hazardous wastes under Parts 262 through 265 and Parts 122 through 124 of this Chapter and which are subject to the notification requirements of Section 3010 of RCRA. In this Part:

(1) Subpart A defines the terms "solid waste" and "hazardous waste," identifies those wastes which are excluded from regulation under Parts 262 through 265 and 122 through 124 and establishes special management requirements for hazardous waste produced by small quantity generators and hazardous waste which is used, re-used, recycled or reclaimed.

(2) Subpart B sets forth the criteria used by EPA to identify characteristics of hazardous waste and to list particular hazardous wastes.

(3) Subpart C identifies characteristics of hazardous waste.

(4) Subpart D lists particular hazardous wastes.

(b) This Part identifies only some of the materials which are hazardous wastes under Sections 3007 and 7003 of RCRA. A material which is not a hazardous waste identified in this part is still a hazardous waste for purposes of those sections if:

(1) In the case of Section 3007, EPA has reason to believe that the material may be a hazardous waste within the meaning of Section 1004(5) of RCRA.

(2) In the case of Section 7003, the statutory elements are established.

§ 261.2 Definition of solid waste.

(a) A solid waste is any garbage, refuse, sludge or any other waste material which is not excluded under § 261.4(a).

(b) An "other waste material" is any solid, liquid, semi-solid or contained gaseous material, resulting from industrial, commercial, mining or agricultural operations, or from community activities which:

(1) Is discarded or is being accumulated, stored or physically, chemically or biologically treated prior to being discarded; or

(2) Has served its original intended use and sometimes is discarded; or

(3) Is a manufacuring or mining by-product and sometimes is discarded.

(c) A material is "discarded" if it is abandoned (and not used, re-used, reclaimed or recycled) by being:

(1) Disposed of; or

(2) Burned or incinerated, except where the material is being burned as a fuel for the purpose of recovering usable energy; or

(3) Physically, chemically, or biologically treated (other than burned or incinerated) in lieu of or prior to being disposed of.

(d) A material is "disposed of" if it is discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into ground or surface waters.

(e) A "manufacturing or mining by-product" is a material that is not one of the primary products of a particular manufacturing or mining operation, is a secondary and incidental product of the particular operation and would not be solely and separately manufactured or mined by the particular manufacturing or mining operation. The term does not include an intermediate manufacturing or mining product which results from one of the steps in a manufacturing or mining process and is typically processed through the next step of the process within a short time.

§ 261.3 Definition of hazardous waste.

(a) A solid waste, as defined in § 261.2, is a hazardous waste if:

(1) It is not excluded from regulation as a hazardous waste under § 261.4(b); and

(2) It meets any of the following criteria:

(i) It is listed in Subpart D and has not been excluded from the lists in Subpart D under §§ 260.20 and 260.22 of this Chapter.

(ii) It is a mixture of solid waste and one or more hazardous wastes listed in Subpart D and has not been excluded from this paragraph under §§ 260.20 and 260.22 of this Chapter.

(iii) It exhibits any of the characteristics of hazardous waste identified in Subpart C.

(b) A solid waste which is not excluded from regulation under paragraph (a)(1) of this section becomes a hazardous waste when any of the following events occur:

(1) In the case of a waste listed in Subpart D, when the waste first meets the listing description set forth in Subpart D.

(2) In the case of a mixture of solid waste and one or more listed hazardous wastes, when a hazardous waste listed

in Subpart D is first added to the solid waste.

(3) In the case of any other waste (including a waste mixture), when the waste exhibits any of the characteristics identified in Subpart C.

(c) Unless and until it meets the criteria of paragraph (d):

(1) A hazardous waste will remain a hazardous waste.

(2) Any solid waste generated from the treatment, storage or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust or leachate (but not including precipitation run-off), is a hazardous waste.

(d) Any solid waste described in paragraph (c) of this section is not a hazardous waste if it meets the following criteria:

(1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in Subpart C.

(2) In the case of a waste which is a listed waste under Subpart D, contains a waste listed under Subpart D or is derived from a waste listed in Subpart D, it also has been excluded from paragraph (c) under §§ 260.20 and 260.22 of this Chapter.

§ 261.4 Exclusions.

(a) *Materials which are not solid wastes.* The following materials are not solid wastes for the purpose of this Part:

(1) (i) Domestic sewage; and

(ii) Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

(2) Industrial wastewater discharges that are point source discharges subject to regulation under Section 402 of the Clean Water Act, as amended.

[Comment: This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.]

(3) Irrigation return flows.

(4) Source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.*

(5) Materials subjected to in-situ mining techniques which are not removed from the ground as part of the extraction process.

(b) *Solid wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:

(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e.g., refuse-derived fuel) or reused. "Household waste" means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels.)

(2) Solid wastes generated by any of the following and which are returned to the soils as fertilizers:

(i) The growing and harvesting of agricultural crops.

(ii) The raising of animals, including animal manures.

(3) Mining overburden returned to the mine site.

(4) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

(5) Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy.

§ 261.5 Special requirements for hazardous waste generated by small quantity generators.

(a) Except as otherwise provided in this section, if a person generates, in a calendar month, a total of less than 1000 kilograms of hazardous wastes, those wastes are not subject to regulation under Parts 262 through 265 and Parts 122 through 124 of this Chapter, and the notification requirements of Section 3010 of RCRA.

(b) If a person whose waste has been excluded from regulation under paragraph (a) of this Section accumulates hazardous wastes in quantities greater than 1000 kilograms, those accumulated wastes are subject to regulation under Parts 262 through 265 and Parts 122 through 124 of this Chapter, and the notification requirements of Section 3010 of RCRA.

(c) If a person generates in a calendar month or accumulates at any time any of the following hazardous wastes in quantities greater than set forth below, those wastes are subject to regulation under Parts 262 through 265 and Parts 122 through 124 of this Chapter, and the notification requirements of Section 3010 of RCRA:

(1) One kilogram of any commercial product or manufacturing chemical intermediate having the generic name listed in § 261.33(e).

(2) One kilogram of any off-specification commercial chemical product or manufacturing chemical intermediate which, if it met specifications, would have the generic name listed in § 261.33(e).

(3) Any containers identified in § 261.33(c) that are larger than 20 liters in capacity;

(4) 10 kilograms of inner liners from containers identified under § 261.33(c);

(5) 100 kilograms of any residue or contaminated soil, water or other debris resulting from the cleanup of a spill, into or on any land or water, of any commercial chemical product or manufacturing chemical intermediate having the generic name listed in § 261.33(e).

(d) In order for hazardous waste to be excluded from regulation under this section, the generator must comply with § 262.11 of this Chapter. He must also either treat or dispose of the waste in an on-site facility, or ensure delivery to an off-site treatment, storage or disposal facility, either of which is:

(1) Permitted by EPA under Part 122 of this Chapter, or by a State with a hazardous waste management program authorized under Part 123 of this Chapter;

(2) In interim status under Parts 122 and 265 of this Chapter; or,

(3) Permitted, licensed, or registered by a State to manage municipal or industrial solid waste.

(e) Hazardous waste subject to the reduced requirements of this section may be mixed with non-hazardous waste and remain subject to these reduced requirements even though the resultant mixture exceeds the quantity limitations identified in this section, unless the mixture meets any of the characteristics of hazardous waste identified in Subpart C.

§ 261.6 Special requirements for hazardous waste which is used, re-used, recycled or reclaimed.

(a) Except as otherwise provided in paragraph (b) of this section, a hazardous waste which meets either of the following criteria is not subject to regulation under Parts 262 through 265 or Parts 122 through 124 of this Chapter and is not subject to the notification requirements of Section 3010 of RCRA until such time as the Administrator promulgates regulations to the contrary:

(1) It is being beneficially used or re-used or legitimately recycled or reclaimed.

(2) It is being accumulated, stored or physically, chemically or biologically treated prior to beneficial use or re-use or legitimate recycling or reclamation.

(b) A hazardous waste which is a sludge, or which is listed in Subpart D, or which contains one or more hazardous wastes listed in Subpart D; and which is transported or stored prior to being used, re-used, recycled or reclaimed is subject to the following requirements with respect to such transportation or storage:

(1) Notification requirements under Section 3010 RCRA.

(2) Part 262 of this Chapter.

(3) Part 263 of this Chapter.

(4) Subparts A, B, C, D and E of Part 264 of this Chapter.

(5) Subparts A, B, C, D, E, G, H, I, J and L of Part 265 of this Chapter.

(6) Parts 122 and 124 of this Chapter, with respect to storage facilities.

Subpart B—Criteria for Identifying the Characteristics of Hazardous Waste and for Listing Hazardous Waste

§ 261.10 Criteria for identifying the characteristics of hazardous waste.

(a) The Administrator shall identify and define a characteristic of hazardous waste in Subpart C only upon determining that:

(1) A solid waste that exhibits the characteristic may:

(i) Cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(ii) Pose a substantial present or potential hazard to human health or the environment when it is improperly treated, stored, transported, disposed of or otherwise managed; and

(2) The characteristic can be:

(i) Measured by an available standardized test method which is reasonably within the capability of generators of solid waste or private sector laboratories that are available to serve generators of solid waste; or

(ii) Reasonably detected by generators of solid waste through their knowledge of their waste.

§ 261.11 Criteria for listing hazardous waste.

(a) The Administrator shall list a solid waste as a hazardous waste only upon determining that the solid waste meets one of the following criteria:

(1) It exhibits any of the characteristics of hazardous waste identified in Subpart C.

(2) It has been found to be fatal to humans in low doses or, in the absence of data on human toxicity, it has been shown in studies to have an oral LD 50 toxicity (rat) of less than 50 milligrams per kilogram, an inhalation LC 50 toxicity (rat) of less than 2 milligrams per liter, or a dermal LD 50 toxicity (rabbit) of less than 200 milligrams per kilogram or is otherwise capable of causing or significantly contributing to an increase in serious irreversible, or incapacitating reversible, illness. (Waste listed in accordance with these criteria will be designated Acute Hazardous Waste.)

(3) It contains any of the toxic constituents listed in Appendix VIII unless, after considering any of the following factors, the Administrator concludes that the waste is not capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of, or otherwise managed:

(i) The nature of the toxicity presented by the constituent.

(ii) The concentration of the constituent in the waste.

(iii) The potential of the constituent or any toxic degradation product of the constituent to migrate from the waste into the environment under the types of improper management considered in paragraph (a)(3)(vii) of this section.

(iv) The persistence of the constituent or any toxic degradation product of the constituent.

(v) The potential for the constituent or any toxic degradation product of the constituent to degrade into non-harmful constituents and the rate of degradation.

(vi) The degree to which the constituent or any degradation product of the constituent bioaccumulates in ecosystems.

(vii) The plausible types of improper management to which the waste could be subjected.

(viii) The quantities of the waste generated at individual generation sites or on a regional or national basis.

(ix) The nature and severity of the human health and environmental damage that has occurred as a result of the improper management of wastes containing the constituent.

(x) Action taken by other governmental agencies or regulatory programs based on the health or environmental hazard posed by the waste or waste constituent.

(xi) Such other factors as may be appropriate.

Substances will be listed on Appendix VIII only if they have been shown in scientific studies to have toxic, carcinogenic, mutagenic or teratogenic effects on humans or other life forms.

(Wastes listed in accordance with these criteria will be designated Toxic wastes.)

(b) The Administrator may list classes or types of solid waste as hazardous waste if he has reason to believe that individual wastes, within the class or type of waste, typically or frequently are hazardous under the definition of hazardous waste found in Section 1004(5) of the Act.

(c) The Administrator will use the criteria for listing specified in this section to establish the exclusion limits referred to in § 261.5(c).

Subpart C—Characteristics of Hazardous Waste

§ 261.20 General.

(a) A solid waste, as defined in § 261.2, which is not excluded from regulation as a hazardous waste under § 261.4(b), is a hazardous waste if it exhibits any of the characteristics identified in this Subpart.

[Comment: § 262.11 of this Chapter sets forth the generator's responsibility to determine whether his waste exhibits one or more of the characteristics identified in this Subpart]

(b) A hazardous waste which is identified by a characteristic in this subpart, but is not listed as a hazardous waste in Subpart D, is assigned the EPA Hazardous Waste Number set forth in the respective characteristic in this Subpart. This number must be used in complying with the notification requirements of Section 3010 of the Act and certain recordkeeping and reporting requirements under Parts 262 through 265 and Part 122 of this Chapter.

(c) For purposes of this Subpart, the Administrator will consider a sample obtained using any of the applicable sampling methods specified in Appendix I to be a representative sample within the meaning of Part 260 of this Chapter.

[Comment: Since the Appendix I sampling methods are not being formally adopted by the Administrator, a person who desires to employ an alternative sampling method is not required to demonstrate the equivalency of his method under the procedures set forth in §§ 260.20 and 260.21.]

§ 261.21 Characteristic of ignitability.

(a) A solid waste exhibits the characteristic of ignitability if a representative sample of the waste has any of the following properties:

(1) It is a liquid, other than an aqueous solution containing less than 24 percent alcohol by volume, and has a flash point less than 60°C (140°F), as determined by a Pensky-Martens Closed Cup Tester, using the test method specified in ASTM Standard D-93-79, or a Setaflash Closed Cup Tester, using the test method specified in ASTM standard D-3278-78, or as determined by an equivalent test method approved by the Administrator under the procedures set forth in §§ 260.20 and 260.21.[1]

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[1] ASTM Standards are available from ASTM, 1916 Race Street, Philadelphia, PA 19103.

(2) It is not a liquid and is capable, under standard temperature and pressure, of causing fire through friction, absorption of moisture or spontaneous chemical changes and, when ignited, burns so vigorously and persistently that is creates a hazard

(3) It is an ignitable compressed gas as defined in 49 CFR 173.300 and as determined by the test methods described in that regulation or equivalent test methods approved by the Administrator under §§ 260.20 and 260.21.

(4) It is an oxidizer as defined in 49 CFR 173.151.

(b) A solid waste that exhibits the characteristic of ignitability, but is not listed as a hazardous waste in Subpart D, has the EPA Hazardous Waste Number of D001.

§ 261.22 Characteristic of corrosivity.

(a) A solid waste exhibits the characteristic of corrosivity if a representative sample of the waste has either of the following properties:

(1) It is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using either the test method specified in the "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods" [2] (also described in "Methods for Analysis of Water and Wastes" EPA 600/4-79-020, March 1979), or an equivalent test method approved by the Administrator under the procedures set forth in §§ 260.20 and 260.21.

(2) It is a liquid and corrodes steel (SAE 1020) at a rate greater than 6.35 mm (0.250 inch) per year at a test temperature of 55°C (130°F) as determined by the test method specified in NACE (National Association of Corrosion Engineers) Standard TM-01-69 [3] as standardized in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods," or an equivalent test method approved by the Administrator under the procedures set forth in §§ 260.20 and 260.21.

(b) A solid waste that exhibits the characteristic of corrosivity, but is not listed as a hazardous waste in Subpart D, has the EPA Hazardous Waste Number of D002.

§ 261.23 Characteristic of reactivity.

(a) A solid waste exhibits the characteristic of reactivity if a representative sample of the waste has *any* of the following properties:

(1) It is normally unstable and readily undergoes violent change without detonating.

(2) It reacts violently with water.

(3) It forms potentially explosive mixtures with water.

(4) When mixed with water, it generates toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment.

(5) It is a cyanide or sulfide bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment.

(6) It is capable of detonation or explosive reaction if it is subjected to a strong initiating source or if heated under confinement.

(7) It is readily capable of detonation or explosive decomposition or reaction at standard temperature and pressure.

(8) It is a forbidden explosive as defined in 49 CFR 173.51, or a Class A explosive as defined in 49 CFR 173.53 or a Class B explosive as defined in 49 CFR 173.88.

(b) A solid waste that exhibits the characteristic of reactivity, but is not listed as a hazardous waste in Subpart D, has the EPA Hazardous Waste Number of D003.

§ 261.24 Characteristic of EP Toxicity.

(a) A solid waste exhibits the characteristic of EP toxicity if, using the test methods described in Appendix II or equivalent methods approved by the Administrator under the procedures set forth in §§ 260.20 and 260.21, the extract from a representative sample of the waste contains any of the contaminants listed in Table I at a concentration equal to or greater than the respective value given in that Table. Where the waste contains less than 0.5 percent filterable solids, the waste itself, after filtering, is considered to be the extract for the purposes of this section.

(b) A solid waste that exhibits the characteristic of EP toxicity, but is not listed as a hazardous waste in Subpart D, has the EPA Hazardous Waste Number specified in Table I which corresponds to the toxic contaminant causing it to be hazardous.

Table I.—Maximum Concentration of Contaminants for Characteristic of EP Toxicity—Continued

EPA hazardous waste number	Contaminant	Maximum concentration (milligrams per liter)
D004	Arsenic	5.0
D005	Barium	100.0
D006	Cadmium	1.0
D007	Chromium	5.0
D008	Lead	5.0
D009	Mercury	0.2
D010	Selenium	1.0
D011	Silver	5.0
D012	Endrin (1,2,3,4,10,10-hexachloro-1,7-epoxy-1,4,4a,5,6,7,8,8a-octahydro-1,4-endo, endo-5,8-dimethano naphthalene.	0.02
D013	Lindane (1,2,3,4,5,6-hexachlorocyclohexane, gamma isomer.	0.4
D014	Methoxychlor (1,1,1-Trichloro-2,2-bis [p-methoxyphenyl]ethane).	10.0
D015	Toxaphene ($C_{10}H_{10}Cl_8$, Technical chlorinated camphene, 67-69 percent chlorine).	0.5
D016	2,4-D, (2,4-Dichlorophenoxyacetic acid).	10.0
D017	2,4,5-TP Silvex (2,4,5-Trichlorophenoxypropionic acid).	1.0

Subpart D—Lists of Hazardous Wastes

§ 261.30 General.

(a) A solid waste is a hazardous waste if it is listed in this Subpart, unless it has been excluded from this list under §§ 260.20 and 260.22.

(b) The Administrator will indicate his basis for listing the classes or types of wastes listed in this Subpart by employing one or more of the following Hazard Codes:

Ignitable Waste	(I)
Corrosive Waste	(C)
Reactive Waste	(R)
EP Toxic Waste	(E)
Acute Hazardous Waste	(H)
Toxic Waste	(T)

Appendix VII identifies the constituent which caused the Administrator to list the waste as an EP Toxic Waste (E) or Toxic Waste (T) in §§ 261.31 and 261.32.

(c) Each hazardous waste listed in this Subpart is assigned an EPA Hazardous Waste Number which precedes the name of the waste. This number must be used in complying with the notification requirements of Section 3010 of the Act and certain recordkeeping and reporting requirements under Parts 262 through 265 and Part 122 of this Chapter.

(d) Certain of the hazardous wastes listed in § 261.31 or § 261.32 have exclusion limits that refer to § 261.5(c)(5).

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[2] This document is available from Solid Waste Information, U.S. Environmental Protection Agency, 26 W. St. Clair Street, Cincinnati, Ohio 45268.

[3] The NACE Standard is available from the National Association of Corrosion Engineers, P.O. Box 986, Katy, Texas 77450.

§ 261.31 Hazardous waste from nonspecific sources.

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
Generic:		
F001	The spent halogenated solvents used in degreasing, tetrachloroethylene, trichloroethylene, methylene chloride, 1,1,1-trichloroethane, carbon tetrachloride, and the chlorinated fluorocarbons; and sludges from the recovery of these solvents in degreasing operations.	(T)
F002	The spent halogenated solvents, tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, o-dichlorobenzene, trichlorofluoromethane and the still bottoms from the recovery of these solvents.	(T)
F003	The spent non-halogenated solvents, xylene, acetone, ethyl acetate, ethyl benzene, ethyl ether, n-butyl alcohol, cyclohexanone, and the still bottoms from the recovery of these solvents.	(I)
F004	The spent non-halogenated solvents, cresols and cresylic acid, nitrobenzene, and the still bottoms from the recovery of these solvents	(T)
F005	The spent non-halogenated solvents, methanol, toluene, methyl ethyl ketone, methyl isobutyl ketone, carbon disulfide, isobutanol, pyridine and the still bottoms from the recovery of these solvents.	(I, T)
F006	Wastewater treatment sludges from electroplating operations	(T)
F007	Spent plating bath solutions from electroplating operations	(R, T)
F008	Plating bath sludges from the bottom of plating baths from electroplating operations	(R, T)
F009	Spent stripping and cleaning bath solutions from electroplating operations	(R, T)
F010	Quenching bath sludge from oil baths from metal heat treating operations	(R, T)
F011	Spent solutions from salt bath pot cleaning from metal heat treating operations	(R, T)
F012	Quenching wastewater treatment sludges from metal heat treating operations	(T)
F013	Flotation tailings from selective flotation from mineral metals recovery operations	(T)
F014	Cyanidation wastewater treatment tailing pond sediment from mineral metals recovery operations	(T)
F015	Spent cyanide bath solutions from mineral metals recovery operations	(R, T)
F016	Dewatered air pollution control scrubber sludges from coke ovens and blast furnaces	(T)

§ 261.32 Hazardous waste from specific sources.

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
Wood Preservation: K001	Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol	(T)
Inorganic Pigments:		
K002	Wastewater treatment sludge from the production of chrome yellow and orange pigments	(T)
K003	Wastewater treatment sludge from the production of molybdate orange pigments	(T)
K004	Wastewater treatment sludge from the production of zinc yellow pigments	(T)
K005	Wastewater treatment sludge from the production of chrome green pigments	(T)
K006	Wastewater treatment sludge from the production of chrome oxide green pigments (anhydrous and hydrated)	(T)
K007	Wastewater treatment sludge from the production of iron blue pigments	(T)
K008	Oven residue from the production of chrome oxide green pigments	(T)
Organic Chemicals:		
K009	Distillation bottoms from the production of acetaldehyde from ethylene	(T)
K010	Distillation side cuts from the production of acetaldehyde from ethylene	(T)
K011	Bottom stream from the wastewater stripper in the production of acrylonitrile	(R, T)
K012	Still bottoms from the final purification of acrylonitrile in the production of acrylonitrile	(T)
K013	Bottom stream from the acetonitrile column in the production of acrylonitrile	(R, T)
K014	Bottoms from the acetonitrile purification column in the production of acrylonitrile	(T)
K015	Still bottoms from the distillation of benzyl chloride	(T)
K016	Heavy ends or distillation residues from the production of carbon tetrachloride	(T)
K017	Heavy ends (still bottoms) from the purification column in the production of epichlorohydrin	(T)
K018	Heavy ends from fractionation in ethyl chloride production	(T)
K019	Heavy ends from the distillation of ethylene dichloride in ethylene dichloride production	(T)
K020	Heavy ends from the distillation of vinyl chloride in vinyl chloride monomer production	(T)
K021	Aqueous spent antimony catalyst waste from fluoromethanes production	(T)
K022	Distillation bottom tars from the production of phenol/acetone from cumene	(T)
K023	Distillation light ends from the production of phthalic anhydride from naphthalene	(T)
K024	Distillation bottoms from the production of phthalic anhydride from naphthalene	(T)
K025	Distillation bottoms from the production of nitrobenzene by the nitration of benzene	(T)
K026	Stripping still tails from the production of methyl ethyl pyridines	(T)
K027	Centrifuge residue from toluene diisocyanate production	(R, T)
K028	Spent catalyst from the hydrochlorinator reactor in the production of 1,1,1-trichloroethane	(T)
K029	Waste from the product stream stripper in the production of 1,1,1-trichloroethane	(T)
K030	Column bottoms or heavy ends from the combined production of trichloroethylene and perchloroethylene	(T)
Pesticides:		
K031	By-products salts generated in the production of MSMA and cacodylic acid	(T)
K032	Wastewater treatment sludge from the production of chlordane	(T)
K033	Wastewater and scrub water from the chlorination of cyclopentadiene in the production of chlordane	(T)
K034	Filter solids from the filtration of hexachlorocyclopentadiene in the production of chlordane	(T)
K035	Wastewater treatment sludges generated in the production of creosote	(T)
K036	Still bottoms from toluene reclamation distillation in the production of disulfoton	(T)
K037	Wastewater treatment sludges from the production of disulfoton	(T)
K038	Wastewater from the washing and stripping of phorate production	(T)
K039	Filter cake from the filtration of diethylphosphorodithoric acid in the production of phorate	(T)
K040	Wastewater treatment sludge from the production of phorate	(T)
K041	Wastewater treatment sludge from the production of toxaphene	(T)
K042	Heavy ends or distillation residues from the distillation of tetrachlorobenzene in the production of 2,4,5-T	(T)
K043	2,6-Dichlorophenol waste from the production of 2,4-D	(T)
Explosives:		
K044	Wastewater treatment sludges from the manufacturing and processing of explosives	(R)
K045	Spent carbon from the treatment of wastewater containing explosives	(R)
K046	Wastewater treatment sludges from the manufacturing, formulation and loading of lead-based initiating compounds	(T)
K047	Pink/red water from TNT operations	(R)
Petroleum Refining:		
K048	Dissolved air flotation (DAF) float from the petroleum refining industry	(T)
K049	Slop oil emulsion solids from the petroleum refining industry	(T)
K050	Heat exchanger bundle cleaning sludge from the petroleum refining industry	(T)
K051	API separator sludge from the petroleum refining industry	(T)
K052	Tank bottoms (leaded) from the petroleum refining industry	(T)
Leather Tanning Finishing:		
K053	Chrome (blue) trimmings generated by the following subcategories of the leather tanning and finishing industry: hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue; and shearing.	(T)

§ 261.32 Hazardous waste from specific sources.—Continued

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
K054	Chrome (blue) shavings generated by the following subcategories of the leather tanning and finishing industry: hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue; and shearling.	(T)
K055	Buffing dust generated by the following subcategories of the leather tanning and finishing industry: hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; and through-the-blue.	(T)
K056	Sewer screenings generated by the following subcategories of the leather tanning and finishing industry: hair pulp/chrome tan/retan//wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue; and shearling.	(T)
K057	Wastewater treatment sludges generated by the following subcategories of the leather tanning and finishing industry: hair pulp/chrome ttan/retan/wet finish; hair save/chrome tan/retan/wet finish; retan/wet finish; no beamhouse; through-the-blue and shearling.	(T)
K058	Wastewater treatment sludges generated by the following subcategories of the leather tanning and finishing industry: hair pulp/chrome ttan/retan/wet finish; hair save/chrome tan/retan/wet finish; and through-the-blue.	(R, T)
K059	Wastewater treatment sludges generated by the following subcategory of the leather tanning and finishing industry: hair save/non-chrome tan/retan/wet finish.	(R)
Iron and Steel:		
K060	Ammonia still lime sludge from coking operations	(T)
K061	Emission control dust/sludge from the electric furnace production of steel	(T)
K062	Spent pickle liquor from steel finishing operations	(C, T)
K063	Sludge from lime treatment of spent pickle liquor from steel finishing operations	(T)
Primary Copper: K064	Acid plant blowdown slurry/sludge resulting from the thickening of blowdown slurry from primary copper production	(T)
Primary Lead: K065	Surface impoundment solids contained in and dredged from surface impoundments at primary lead smelting facilities	(T)
Primary Zinc:		
K066	Sludge from treatment of process wastewater and/or acid plant blowdown from primary zinc production	(T)
K067	Electrolytic anode slimes/sludges from primary zinc production	(T)
K068	Cadmium plant leach residue (iron oxide) from primary zinc production	(T)
Secondary Lead: K069	Emission control dust/sludge from secondary lead smelting	(T)

§ 261.33 Discarded Commercial Chemical Products, Off-Specification Species, Containers, and Spill Residues Thereof.

The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded:

(a) Any commercial chemical product, or manufacturing chemical intermediate having the generic name listed in paragraphs (e) or (f) of this section.

(b) Any off-specification commercial chemical product or manufacturing chemical intermediate which, if it met specifications, would have the generic name listed in paragraphs (e) or (f) of this section.

(c) Any container or inner liner removed from a container that has been used to hold any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraph (e) of this section, unless:

(1) The container or inner liner has been triple rinsed using a solvent capable of removing the commercial chemical product or manufacturing chemical intermediate;

(2) The container or inner liner has been cleaned by another method that has been shown in the scientific literature, or by tests conducted by the generator, to achieve equivalent removal; or

(3) In the case of a container, the inner liner that prevented contact of the commercial chemical product or manufacturing chemical intermediate with the container, has been removed.

(d) Any residue or contaminated soil, water or other debris resulting from the cleanup of a spill, into or on any land or water, of any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraphs (e) or (f) of this Section.

[Comment: The phrase "commercial chemical product or manufacturing chemical intermediate having the generic name listed in . . ." refers to a chemical substance which is manufactured or formulated for commercial or manufacturing use. It does not refer to a material, such as a manufacturing process waste, that contains any of the substances listed in paragraphs (e) or (f). Where a manufacturing process waste is deemed to be a hazardous waste because it contains a substance listed in paragraphs (e) or (f), such waste will be listed in either §§ 261.31 or 261.32 or will be identified as a hazardous waste by the characteristics set forth in Subpart C of this Part.]

(e) The commercial chemical products or manufacturing chemical intermediates, referred to in paragraphs (a) through (d) of this section, are identified as acute hazardous wastes (H) and are subject to the small quantity exclusion defined in § 261.5(c). These wastes and their corresponding EPA Hazardous Waste Numbers are:

Hazardous waste No.	Substance [1]
	1080 see P058
	1081 see P057
	(Acetato)phenylmercury see P092
	Acetone cyanohydrin see P069
P001	3-(alpha-Acetonylbenzyl)-4-hydroxycoumarin and salts
P002	1-Acetyl-2-thiourea
P003	Acrolein
	Agarin see P007
	Agrosan GN 5 see P092
	Aldicarb see P070
	Aldifen see P048

—Continued

Hazardous waste No.	Substance [1]
P004	Aldrin
	Algimycin see P092
P005	Allyl alcohol
P006	Aluminum phosphide (R)
	ALVIT see P037
	Aminoethylene see P054
P007	5-(Aminomethyl)-3-isoxazolol
P008	4-Aminopyridine
	Ammonium metavanadate see P119
P009	Ammonium picrate (R)
	ANTIMUCIN WDR see P092
	ANTURAT see P073
	AQUATHOL see P088
	ARETIT see P020
P010	Arsenic acid
P011	Arsenic pentoxide
P012	Arsenic trioxide
	Athrombin see P001
	AVITROL see P008
	Aziridene see P054
	AZOFOS see P061
	Azophos see P061
	BANTU see P072
P013	Barium cyanide
	BASENITE see P020
	BCME see P016
P014	Benzenethiol
	Benzoepin see P050
P015	Beryllium dust
P016	Bis(chloromethyl) ether
	BLADAN-M see P071
P017	Bromoacetone
P018	Brucine
P019	2-Butanone peroxide
	BUFEN see P092
	Butaphene see P020
P020	2-sec-Butyl-4,6-dinitrophenol
P021	Calcium cyanide
	CALDON see P020
P022	Carbon disulfide
	CERESAN see P092
	CERESAN UNIVERSAL see P092
	CHEMOX GENERAL see P020
	CHEMOX P.E. see P020
	CHEM-TOL see P090
P023	Chloroacetaldehyde
P024	p-Chloroaniline
P025	1-(p-Chlorobenzoyl)-5-methoxy-2-methylindole-3-acetic acid
P026	1-(o-Chlorophenyl)thiourea
P027	3-Chloropropionitrile
P028	alpha-Chlorotoluene
P029	Copper cyanide
	CRETOX see P108
	Coumadin see P001
	Coumafen see P001
P030	Cyanides

Hazardous waste No.	Substance [1]
P031	Cyanogen
P032	Cyanogen bromide
P033	Cyanogen chloride
	Cyclodan see P050
P034	2-Cyclohexyl-4,6-dinitrophenol
	D-CON see P001
	DETHMOR see P001
	DETHNEL see P001
	DFP see P043
P035	2,4-Dichlorophenoxyacetic acid (2,4-D)
P036	Dichlorophenylarsine
	Dicyanogen see P031
P037	Dieldrin
	DIELDREX see P037
P038	Diethylarsine
P039	0,0-Diethyl-S-(2-(ethylthio)ethyl)ester of phosphorothioic acid
P040	0,0-Diethyl-0-(2-pyrazinyl)phosphorothioate
P041	0,0-Diethyl phosphoric acid, 0-p-nitrophenyl ester
P042	3,4-Dihydroxy-alpha-(methylamino)-methyl benzyl alcohol
P043	Di-isopropylfluorophosphate
	DIMETATE see P044
	1,4:5,8-Dimethanonaphthalene, 1,2,3,4,10,10-hexachloro-1,4,4a,5,8,8a-hexahydro endo, endo see P060
P044	Dimethoate
P045	3,3-Dimethyl-1-(methylthio)-2-butanone-O-[(methylamino)carbonyl] oxime
P046	alpha,alpha-Dimethylphenethylamine
	Dinitrocyclohexylphenol see P034
P047	4,6-Dinitro-o-cresol and salts
P048	2,4-Dinitrophenol
	DINOSEB see P020
	DINOSEBE see P020
	Disulfoton see P039
P049	2,4-Dithiobiuret
	DNBP see P020
	DOLCO MOUSE CEREAL see P108
	DOW GENERAL see P020
	DOW GENERAL WEED KILLER see P020
	DOW SELECTIVE WEED KILLER see P020
	DOWICIDE G see P090
	DYANACIDE see P092
	EASTERN STATES DUOCIDE see P001
	ELGETOL see P020
P050	Endosulfan
P051	Endrin
	Epinephrine see P042
P052	Ethylcyanide
P053	Ethylenediamine
P054	Ethyleneimine
	FASCO FASCRAT POWDER see P001
	FEMMA see P091
P055	Ferric cyanide
P056	Fluorine
P057	2-Fluoroacetamide
P058	Fluoroacetic acid, sodium salt
	FOLODOL-80 see P071
	FOLODOL M see P071
	FOSFERNO M 50 see P071
	FRATOL see P058
	Fulminate of mercury see P065
	FUNGITOX OR see P092
	FUSSOF see P057
	GALLOTOX see P092
	GEARPHOS see P071
	GERUTOX see P020
P059	Heptachlor
P060	1,2,3,4,10,10-Hexachloro-1,4,4a,5,8,8a-hexahydro-1,4:5,8-endo, endo-dimethanonaphthalene
	1,4,5,6,7,7-Hexachloro-cyclic-5-norbornene-2,3-dimethanol sulfite see P050
P061	Hexachloropropene
P062	Hexaethyl tetraphosphate
	HOSTAQUICK see P092
	HOSTAQUIK see P092
	Hydrazomethane see P068
P063	Hydrocyanic acid
	ILLOXOL see P037
	INDOCI see P025
	Indomethacin see P025
	INSECTOPHENE see P050
	Isodrin see P060
P064	Isocyanic acid, methyl ester
	KILOSEB see P020
	KOP-THIODAN see P050
	KWIK-KIL see P108
	KWIKSAN see P092
	KUMADER see P001
	KYPFARIN see P001
	LEYTOSAN see P092
	LIQUIPHENE see P092
	MALIK see P050
	MAREVAN see P001
	MAR-FRIN see P001
	MARTIN'D MAR-FRIN see P001
	MAVERAN see P001
	MEGATOX see P005
P065	Mercury fulminate
	MERSOLITE see P092
	METACID 50 see P071
	METAFOS see P071
	METAPHOR see P071
	METAPHOS see P071
	METASOL 30 see P092
P066	Methomyl
P067	2-Methylaziridine
	METHYL-E 605 see P071
P068	Methyl hydrazine
	Methyl isocyanate see P064
P069	2-Methyllactonitrile
P070	2-Methyl-2-(methylthio)propionaldehyde-o-(methylcarbonyl) oxime
	METHYL NIRON see P042
P071	Methyl parathion
	METRON see P071
	MOLE DEATH see P108
	MOUSE-NOTS see P108
	MOUSE-RID see P108
	MOUSE-TOX see P108
	MUSCIMOL see P007
P072	1-Naphthyl-2-thiourea
P073	Nickel carbonyl
P074	Nickel cyanide
P075	Nicotine and salts
P076	Nitric oxide
P077	p-Nitroaniline
P078	Nitrogen dioxide
P079	Nitrogen peroxide
P080	Nitrogen tetroxide
P081	Nitroglycerine (R)
P082	N-Nitrosodimethylamine
P083	N-Nitrosodiphenylamine
P084	N-Nitrosomethylvinylamine
	NYLMERATE see P092
	OCTALOX see P037
P085	Octamethylpyrophosphoramide
	OCTAN see P092
P086	Oleyl alcohol condensed with 2 moles ethylene oxide
	OMPA see P085
	OMPACIDE see P085
	OMPAX see P085
P087	Osmium tetroxide
P088	7-Oxabicyclo[2.2.1]heptane-2,3-dicarboxylic acid
	PANIVARFIN see P001
	PANORAM D-31 see P037
	PANTHERINE see P007
	PANWARFIN see P001
P089	Parathion
	PCP see P090
	PENNCAP-M see P071
	PENOXYL CARBON N see P048
P090	Pentachlorophenol
	Pentachlorophenate see P090
	PENTA-KILL see P090
	PENTASOL see P090
	PENWAR see P090
	PERMICIDE see P090
	PERMAGUARD see P090
	PERMATOX see P090
	PERMITE see P090
	PERTOX see P090
	PESTOX III see P085
	PHENMAD see P092
	PHENOTAN see P020
P091	Phenyl dichloroarsine
	Phenyl mercaptan see P014
P092	Phenylmercury acetate
P093	N-Phenylthiourea
	PHILIPS 1861 see P008
	PHIX see P092
P094	Phorate
P095	Phosgene
P096	Phosphine
P097	Phosphorothioic acid, 0,0-dimethyl ester, 0-ester with N,N-dimethyl benzene sulfonamide
	Phosphorothioic acid 0,0-dimethyl-0-(p-nitrophenyl) ester see P071
	PIED PIPER MOUSE SEED see P108
P098	Potassium cyanide
P099	Potassium silver cyanide
	PREMERGE see P020
P100	1,2-Propanediol
	Propargyl alcohol see P102
P101	Propionitrile
P102	2-Propyn-1-o1
	PROTHROMADIN See P001
	QUICKSAM see P092
	QUINTOX see P037
	RAT AND MICE BAIT see P001
	RAT-A-WAY see P001
	RAT-B-GON see P001
	RAT-O-CIDE #2 see P001
	RAT-GUARD see P001
	RAT-KILL see P001
	RAT-MIX see P001
	RATS-NO-MORE see P001
	RAT-OLA see P001
	RATOREX see P001
	RATTUNAL see P001
	RAT-TROL see P001
	RO-DETH see P001
	RO-DEX see P108
	ROSEX see P001
	ROUGH & READY MOUSE MIX see P001
	SANASEED see P108
	SANTOBRITE see P090
	SANTOPHEN see P090
	SANTOPHEN 20 see P090
	SCHRADAN see P085
P103	Selenourea
P104	Silver Cyanide
	SMITE see P105
	SPARIC see P020
	SPOR-KIL see P092
	SPRAY-TROL BRAND RODEN-TROL see P001
	SPURGE see P020
P105	Sodium azide
	Sodium coumadin see P001
P106	Sodium cyanide
	Sodium fluoroacetate see P058
	SODIUM WARFARIN see P001
	SOLFARIN see P001
	SOLFOBLACK BB see P048
	SOLFOBLACK SB see P048
P107	Strontium sulfide
P108	Strychnine and salts
	SUBTEX see P020
	SYSTAM see P085
	TAG FUNGICIDE see P092
	TEKWAISA see P071
	TEMIC see P070
	TEMIK see P070
	TERM-I-TROL see P090
P109	Tetraethyldithiopyrophosphate
P110	Tetraethyl lead
P111	Tetraethylpyrophosphate
P112	Tetranitromethane
	Tetraphosphoric acid, hexaethyl ester see P062
	TETROSULFUR BLACK PB see P048
	TETROSULPHUR PBR see P048
P113	Thallic oxide
	Thallium peroxide see P113
P114	Thallium selenite
P115	Thallium (I) sulfate
	THIFOR see P092
	THIMUL see P092
	THIODAN see P050
	THIOFOR see P050
	THIOMUL see P050
	THIONEX see P050
	THIOPHENIT see P071
P116	Thiosemicarbazide
	Thiosulfan tionel see P050
P117	Thiuram
	THOMPSON'S WOOD FIX see P090
	TIOVEL see P050
P118	Trichloromethanethiol
	TWIN LIGHT RAT AWAY see P001
	USAF RH-8 see P069
	USAF EK-4890 see P002
P119	Vanadic acid, ammonium salt
P120	Vanadium pentoxide
	VOFATOX see P071
	WANADU see P120
	WARCOUMIN see P001
	WARFARIN SODIUM see P001
	WARFICIDE see P001
	WOFOTOX see P072
	YANOCK see P057
	YASOKNOCK see P058
	ZIARNIK see P092
P121	Zinc cyanide
P122	Zinc phosphide (R,T)
	ZOOCOUMARIN see P001

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[1] The Agency included those trade names of which it was aware; an omission of a trade name does not imply that the omitted material is not hazardous. The material is hazardous if it is listed under its generic name.

(f) The commercial chemical products or manufacturing chemical intermediates, referred to in paragraphs (a), (b) and (d) of this section, are identified as toxic wastes (T) unless otherwise designated and are subject to the small quantity exclusion defined in § 261.5 (a) and (b). These wastes and their corresponding EPA Hazardous Waste Numbers are:

Hazardous Waste No.	Substance[1]
	AAF see U005
U001	Acetaldehyde
U002	Acetone (I)
U003	Acetonitrile (I,T)
U004	Acetophenone
U005	2-Acetylaminoflourene
U006	Acetyl chloride (C,T)
U007	Acrylamide
	Acetylene tetrachloride see U209
	Acetylene trichloride see U228
U008	Acrylic acid (I)
U009	Acrylonitrile
	AEROTHENE TT see U226
	3-Amino-5-(p-acetamidophenyl)-1H-1,2,4-triazole, hydrate see U011
U010	6-Amino-1,1a,2,8,8a,8b-hexahydro-8-(hydroxymethyl)8-methoxy-5-methylcarbamate azirino(2',3':3,4) pyrrolo(1,2-a) indole-4, 7-dione (ester)
U011	Amitrole
U012	Aniline (I)
U013	Asbestos
U014	Auramine
U015	Azaserine
U016	Benz[c]acridine
U017	Benzal chloride
U018	Benz[a]anthracene
U019	Benzene
U020	Benzenesulfonyl chloride (C,R)
U021	Benzidine
	1,2-Benzisothiazolin-3-one, 1,1-dioxide see U202
	Benzo[a]anthracene see U018
U022	Benzo[a]pyrene
U023	Benzotrichloride (C,R,T)
U024	Bis(2-chloroethoxy)methane
U025	Bis(2-chloroethyl) ether
U026	N,N-Bis(2-chloroethyl)-2-naphthylamine
U027	Bis(2-chloroisopropyl) ether
U028	Bis(2-ethylhexyl) phthalate
U029	Bromomethane
U030	4-Bromophenyl phenyl ether
U031	n-Butyl alcohol (I)
U032	Calcium chromate
	Carbolic acid see U188
	Carbon tetrachloride see U211
U033	Carbonyl fluoride
U034	Chloral
U035	Chlorambucil
U036	Chlordane
U037	Chlorobenzene
U038	Chlorobenzilate
U039	p-Chloro-m-cresol
U040	Chlorodibromomethane
U041	1-Chloro-2,3-epoxypropane
	CHLOROETHENE NU see U226
U042	Chloroethyl vinyl ether
U043	Chloroethene
U044	Chloroform (I,T)
U045	Chloromethane (I,T)
U046	Chloromethyl methyl ether
U047	2-Chloronaphthalene
U048	2-Chlorophenol
U049	4-Chloro-o-toluidine hydrochloride
U050	Chrysene
	C.I. 23060 see U073
U051	Creosote
U052	Cresols
U053	Crotonaldehyde
U054	Cresylic acid
U055	Cumene
	Cyanomethane see U003
U056	Cyclohexane (I)
U057	Cyclohexanone (I)
U058	Cyclophosphamide
U059	Daunomycin
U060	DDD
U061	DDT
U062	Diallate
U063	Dibenz[a,h]anthracene
	Dibenzo[a,h]anthracene see U063
U064	Dibenzo[a,i]pyrene
U065	Dibromochloromethane
U066	1,2-Dibromo-3-chloropropane
U067	1,2-Dibromoethane
U068	Dibromomethane
U069	Di-n-butyl phthalate
U070	1,2-Dichlorobenzene
U071	1,3-Dichlorobenzene
U072	1,4-Dichlorobenzene
U073	3,3'-Dichlorobenzidine
U074	1,4-Dichloro-2-butene
	3,3'-Dichloro-4,4'-diaminobiphenyl see U073
U075	Dichlorodifluoromethane
U076	1,1-Dichloroethane
U077	1,2-Dichloroethane
U078	1,1-Dichloroethylene
U079	1,2-trans-dichloroethylene
U080	Dichloromethane
	Dichloromethylbenzene see U017
U081	2,4-Dichlorophenol
U082	2,6-Dichlorophenol
U083	1,2-Dichloropropane
U084	1,3-Dichloropropene
U085	Diepoxybutane (I,T)
U086	1,2-Diethylhydrazine
U087	0,0-Diethyl-S-methyl ester of phosphorodithioic acid
U088	Diethyl phthalate
U089	Diethylstilbestrol
U090	Dihydrosafrole
U091	3,3'-Dimethoxybenzidine
U092	Dimethylamine (I)
U093	p-Dimethylaminoazobenzene
U094	7,12-Dimethylbenz[a]anthracene
U095	3,3'-Dimethylbenzidine
U096	alpha,alpha-Dimethylbenzylhydroperoxide (R)
U097	Dimethylcarbamoyl chloride
U098	1,1-Dimethylhydrazine
U099	1,2-Dimethylhydrazine
U100	Dimethylnitrosoamine
U101	2,4-Dimethylphenol
U102	Dimethyl phthalate
U103	Dimethyl sulfate
U104	2,4-Dinitrophenol
U105	2,4-Dinitrotoluene
U106	2,6-Dinitrotoluene
U107	Di-n-octyl phthalate
U108	1,4-Dioxane
U109	1,2-Diphenylhydrazine
U110	Dipropylamine (I)
U111	Di-n-propylnitrosamine
	EBDC see U114
	1,4-Epoxybutane see U213
U112	Ethyl acetate (I)
U113	Ethyl acrylate (I)
U114	Ethylenebisdithiocarbamate
U115	Ethylene oxide (I,T)
U116	Ethylene thiourea
U117	Ethyl ether (I,T)
U118	Ethylmethacrylate
U119	Ethyl methanesulfonate
	Ethylnitrile see U003
	Firemaster T23P see U235
U120	Fluoranthene
U121	Fluorotrichloromethane
U122	Formaldehyde
U123	Formic acid (C,T)
U124	Furan (I)
U125	Furfural (I)
U126	Glycidylaldehyde
U127	Hexachlorobenzene
U128	Hexachlorobutadiene
U129	Hexachlorocyclohexane
U130	Hexachlorocyclopentadiene
U131	Hexachloroethane
U132	Hexachlorophene
U133	Hydrazine (R,T)
U134	Hydrofluoric acid (C,T)
U135	Hydrogen sulfide
	Hydroxybenzene see U188
U136	Hydroxydimethyl arsine oxide
	4,4'-(Imidocarbonyl)bis(N,N-dimethyl)aniline see U014
U137	Indeno(1,2,3-cd)pyrene
U138	Iodomethane
U139	Iron Dextran
U140	Isobutyl alcohol
U141	Isosafrole
U142	Kepone
U143	Lasiocarpine
U144	Lead acetate
U145	Lead phosphate
U146	Lead subacetate
U147	Maleic anhydride
U148	Maleic hydrazide
U149	Malononitrile
	MEK Peroxide see U160
U150	Melphalan
U151	Mercury
U152	Methacrylonitrile
U153	Methanethiol
U154	Methanol
U155	Methapyrilene
	Methyl alcohol see U154
U156	Methyl chlorocarbonate
	Methyl chloroform see U226
U157	3-Methylcholanthrene
	Methyl chloroformate see U156
U158	4,4'-Methylene-bis-(2-chloroaniline)
U159	Methyl ethyl ketone (MEK) (I,T)
U160	Methyl ethyl ketone peroxide (R)
	Methyl iodide see U138
U161	Methyl isobutyl ketore
U162	Methyl methacrylate (R,T)
U163	N-Methyl-N'-nitro-N-nitrosoguanidine
U164	Methylthiouracil
	Mitomycin C see U010
U165	Naphthalene
U166	1,4-Naphthoquinone
U167	1-Naphthylamine
U168	2-Naphthylamine
U169	Nitrobenzene (I,T)
	Nitrobenzol see U169
U170	4-Nitrophenol
U171	2-Nitropropane (I)
U172	N-Nitrosodi-n-butylamine
U173	N-Nitrosodiethanolamine
U174	N-Nitrosodiethylamine
U175	N-Nitrosodi-n-propylamine
U176	N-Nitroso-n-ethylurea
U177	N-Nitroso-n-methylurea
U178	N-Nitroso-n-methylurethane
U179	N-Nitrosopiperidine
U180	N-Nitrosopyrrolidine
U181	5-Nitro-o-toluidine
U182	Paraldehyde
	PCNB see U185
U183	Pentachlorobenzene
U184	Pentachloroethane
U185	Pentachloronitrobenzene
U186	1,3-Pentadiene (I)
	Perc see U210
	Perchlorethylene see U210
U187	Phenacetin
U188	Phenol
U189	Phosphorous sulfide (R)
U190	Phthalic anhydride
U191	2-Picoline
U192	Pronamide
U193	1,3-Propane sultone
U194	n-Propylamine (I)
U196	Pyridine
U197	Quinones
U200	Reserpine
U201	Resorcinol
U202	Saccharin
U203	Safrole
U204	Selenious acid
U205	Selenium sulfide (R,T)
	Silvex see U233
U206	Streptozotocin
	2,4,5-T see U232
U207	1,2,4,5-Tetrachlorobenzene
U208	1,1,1,2-Tetrachloroethane
U209	1,1,2,2-Tetrachloroethane
U210	Tetrachloroethene
	Tetrachloroethylene see U210
U211	Tetrachloromethane
U212	2,3,4,6-Tetrachlorophenol
U213	Tetrahydrofuran (I)
U214	Thallium (I) acetate
U215	Thallium (I) carbonate
U216	Thallium (I) chloride
U217	Thallium (I) nitrate
U218	Thioacetamide
U219	Thiourea
U220	Toluene
U221	Toluenediamine
U222	o-Toluidine hydrochloride

Hazardous Waste No.	Substance[1]
U223	Toluene diisocyanate
U224	Toxaphene
	2,4,5-TP see U233
U225	Tribromomethane
U226	1,1,1-Trichloroethane
U227	1,1,2-Trichloroethane
U228	Trichloroethene
	Trichloroethylene see U228
U229	Trichlorofluoromethane
U230	2,4,5-Trichlorophenol
U231	2,4,6-Trichlorophenol
U232	2,4,5-Trichlorophenoxyacetic acid
U233	2,4,5-Trichlorophenoxypropionic acid alpha, alpha, alpha- Trichlorotoluene see U023
	TRI-CLENE see U228
U234	Trinitrobenzene (R,T)
U235	Tris(2,3-dibromopropyl) phosphate
U236	Trypan blue
U237	Uracil mustard
U238	Urethane
	Vinyl chloride see U043
	Vinylidene chloride see U078
U239	Xylene

[1] The Agency included those trade names of which it was aware; an omission of a trade name does not imply that it is not hazardous. The material is hazardous if it is listed under its generic name.

Appendix I—Representative Sampling Methods

The methods and equipment used for sampling waste materials will vary with the form and consistency of the waste materials to be sampled. Samples collected using the sampling protocols listed below, for sampling waste with properties similar to the indicated materials, will be considered by the Agency to be representative of the waste.

Extremely viscous liquid—ASTM Standard D140-70 Crushed or powdered material—ASTM Standard D346-75 Soil or rock-like material—ASTM Standard D420-69 Soil-like material—ASTM Standard D1452-65

Fly Ash-like material—ASTM Standard D2234-76 [ASTM Standards are available from ASTM, 1916 Race St., Philadelphia, PA 19103]

Containerized liquid wastes—"COLIWASA" described in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods," [1] U.S. Environmental Protection Agency, Office of Solid Waste, Washington, D.C. 20460. [Copies may be obtained from Solid Waste Information, U.S. Environmental Protection Agency, 26 W. St. Clair St., Cincinnati, Ohio 45268]

Liquid waste in pits, ponds, lagoons, and similar reservoirs.—"Pond Sampler" described in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods." [1]

This manual also contains additional information on application of these protocols.

Appendix II—EP Toxicity Test Procedure

A. Extraction Procedure (EP)

1. A representative sample of the waste to be tested (minimum size 100 grams) should be obtained using the methods specified in Appendix I or any other methods capable of yielding a representative sample within the meaning of Part 260. [For detailed guidance on conducting the various aspects of the EP see "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods," SW-846, U.S. Environmental Protection Agency Office of Solid Waste, Washington, D.C. 20460.[1]]

2. The sample should be separated into its component liquid and solid phases using the method described in "Separation Procedure" below. If the solid residue [2] obtained using this method totals less than 0.5% of the original weight of the waste, the residue can be discarded and the operator should treat the liquid phase as the extract and proceed immediately to Step 8.

3. The solid material obtained from the Separation Procedure should be evaluated for its particle size. If the solid material has a surface area per gram of material equal to, or greater than, 3.1 cm^2 or passes through a 9.5 mm (0.375 inch) standard sieve, the operator should proceed to Step 4. If the surface area is smaller or the particle size larger than specified above, the solid material should be prepared for extraction by crushing, cutting or grinding the material so that it passes through a 9.5 mm (0.375 inch) sieve or, if the material is in a single piece, by subjecting the material to the "Structural Integrity Procedure" described below.

4. The solid material obtained in Step 3 should be weighed and placed in an extractor with 16 times its weight of deionized water. Do not allow the material to dry prior to weighing. For purposes of this test, an acceptable extractor is one which will impart sufficient agitation to the mixture to not only prevent stratification of the sample and extraction fluid but also insure that all sample surfaces are continously brought into contact with well mixed extraction fluid.

5. After the solid material and deionized water are placed in the extractor, the operator should begin agitation and measure the pH of the solution in the extractor. If the pH is greater than 5.0, the pH of the solution should be decreased to 5.0 ± 0.2 by adding 0.5 N acetic acid. If the pH is equal to or less than 5.0, no acetic acid should be added. The pH of the solution should be monitored, as described below, during the course of the extraction and if the pH rises above 5.2, 0.5N acetic acid should be added to bring the pH down to 5.0 ± 0.2. However, in no event shall the aggregate amount of acid added to the solution exceed 4 ml of acid per gram of solid. The mixture should be agitated for 24 hours and maintained at 20°–40° C (68°–104° F) during this time. It is recommended that the operator monitor and adjust the pH during the course of the extraction with a device such as the Type 45-A pH Controller manufactured by Chemtrix, Inc., Hillsboro, Oregon 97123 or its equivalent, in conjunction with a metering pump and reservoir of 0.5N acetic acid. If such a system is not available, the following manual procedure shall be employed:

(a) A pH meter should be calibrated in accordance with the manufacturer's specifications.

(b) The pH of the solution should be checked and, if necessary, 0.5N acetic acid should be manually added to the extractor until the pH reaches 5.0 ± 0.2. The pH of the solution should be adjusted at 15, 30 and 60 minute intervals, moving to the next longer interval if the pH does not have to be adjusted more than 0.5N pH units.

(c) The adjustment procedure should be continued for at least 6 hours.

(d) If at the end of the 24-hour extraction period, the pH of the solution is not below 5.2 and the maximum amount of acid (4 ml per gram of solids) has not been added, the pH should be adjusted to 5.0 ± 0.2 and the extraction continued for an additional four hours, during which the pH should be adjusted at one hour intervals.

6. At the end of the 24 hour extraction period, deionized water should be added to the extractor in an amount determined by the following equation:

$V = (20)(W) - 16(W) - A$

V= ml deionized water to be added

W= weight in grams of solid charged to extractor

A= ml of 0.5N acetic acid added during extraction

7. The material in the extractor should be separated into its component liquid and solid phases as described under "Separation Procedure."

8. The liquids resulting from Steps 2 and 7 should be combined. This

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[1] These methods are also described in "Samplers and Sampling Procedures for Hazardous Waste Streams," EPA 600/2-80-018, January 1980.

[1] Copies may be obtained from Solid Waste Information, U.S. Environmental Protection Agency, 26 W. St. Clair Street, Cincinnati, Ohio 45268.

[2] The percent solids is determined by drying the filter pad at 80° C until it reaches constant weight and then calculating the percent solids using the following equation:

$$\frac{(\text{weight of pad + solid}) - (\text{tare weight of pad})}{\text{initial weight of sample}} \times 100 = \%\ \text{solids}$$

combined liquid (or the waste itself if it has less than ½ percent solids, as noted in Step 2) is the extract and should be analyzed for the presence of any of the contaminants specified in Table I of § 261.24 using the Analytical Procedures designated below.

Separation Procedure

Equipment: A filter holder, designed for filtration media having a nominal pore size of 0.45 micrometers and capable of applying a 5.3 kg/cm² (75 psi) hydrostatic pressure to the solution being filtered shall be used. For mixtures containing nonabsorptive solids, where separation can be affected without imposing a 5.3 kg/cm² pressure differential, vacuum filters employing a 0.45 micrometers filter media can be used. (For further guidance on filtration equipment or procedures see "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods.")

Procedure: [3]

(i) Following manufacturer's directions, the filter unit should be assembled with a filter bed consisting of a 0.45 micrometer filter membrane. For difficult or slow to filter mixtures a prefilter bed consisting of the following prefilters in increasing pore size (0.65 micrometer membrane, fine glass fiber prefilter, and coarse glass fiber prefilter) can be used.

(ii) The waste should be poured into the filtration unit.

(iii) The reservoir should be slowly pressurized until liquid begins to flow from the filtrate outlet at which point the pressure in the filter should be immediately lowered to 10–15 psig. Filtration should be continued until liquid flow ceases.

(iv) The pressure should be increased stepwise in 10 psi increments to 75 psig and filtration continued until flow ceases or the pressurizing gas begins to exit from the filtrate outlet.

(v) The filter unit should be depressurized, the solid material removed and weighed and then transferred to the extraction apparatus, or, in the case of final filtration prior to analysis, discarded. Do not allow the material retained on the filter pad to dry prior to weighing.

(vi) The liquid phase should be stored at 4°C for subsequent use in Step 8.

B. Structural Integrity Procedure

Equipment: A Structural Integrity Tester having a 3.18 cm (1.25 in.) diameter hammer weighing 0.33 kg (0.73 lbs.) and having a free fall of 15.24 cm (6 in.) shall be used. This device is available from Associated Design and Manufacturing Company, Alexandria, VA., 22314, as Part No. 125, or it may be fabricated to meet the specifications shown in Figure 1.

Procedure:

1. The sample holder should be filled with the material to be tested. If the sample of waste is a large monolithic block, a portion should be cut from the block having the dimensions of a 3.3 cm (1.3 in.) diameter x 7.1 cm (2.8 in.) cylinder. For a fixated waste, samples may be cast in the form of a 3.3 cm (1.3 in.) diameter x 7.1 cm (2.8 in.) cylinder for purposes of conducting this test. In such cases, the waste may be allowed to cure for 30 days prior to further testing.
2. The sample holder should be placed into the Structural Integrity Tester, then the hammer should be raised to its maximum height and dropped. This should be repeated fifteen times.
3. The material should be removed from the sample holder, weighed, and transferred to the extraction apparatus for extraction.

Analytical Procedures for Analyzing Extract Contaminants

The test methods for analyzing the extract are as follows:

(1) For arsenic, barium, cadmium, chromium, lead, mercury, selenium or silver: "Methods for Analysis of Water and Wastes," Environmental Monitoring and Support Laboratory, Office of Research and Development, U.S. Environmental Protection Agency, Cincinnati, Ohio 45268 (EPA-600/4-79-020, March 1979).

(2) For Endrin; Lindane; Methoxychlor; Toxaphene; 2,4-D; 2,4,5-TP Silver: in "Methods for Benzidine, Chlorinated Organic Compounds, Pentachlorophenol and Pesticides in Water and Wastewater," September 1978, U.S. Environmental Protection Agency, Environmental Monitoring and Support Laboratory, Cincinnati, Ohio 42568,

as standardized in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods."

For all analyses, the method of standard addition shall be used for the quantification of species concentration. This method is described in "Test Methods for the Evaluation of Solid Waste." (It is also described in "Methods for Analysis of Water and Wastes.")

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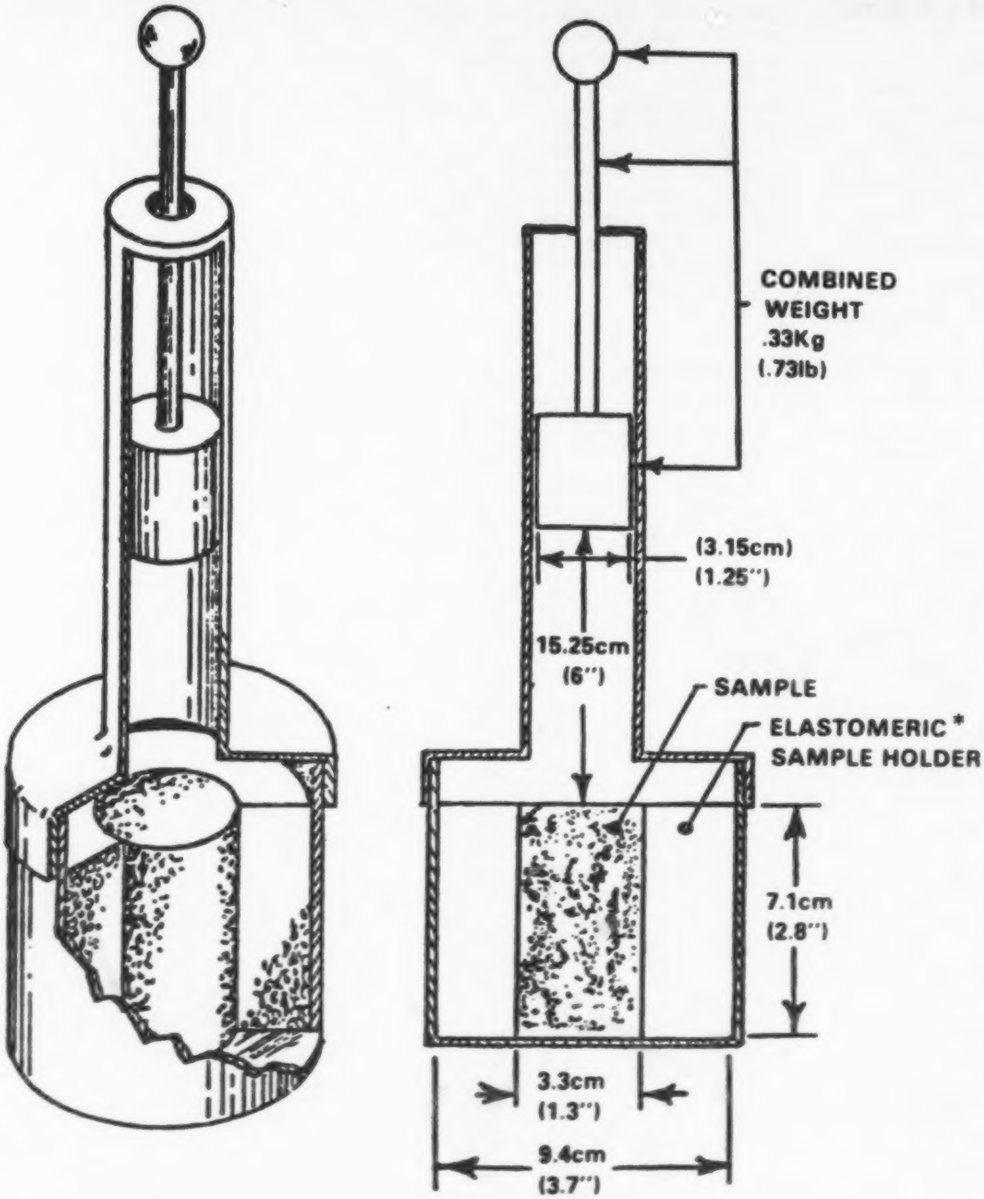
[3] This procedure is intended to result in separation of the "free" liquid portion of the waste from any solid matter having a particle size >0.45um. If the sample will not filter, various other separation techniques can be used to aid in the filtration. As described above, pressure filtration is employed to speed up the filtration process. This does not alter the nature of the separation. If liquid does not separate during filtration, the waste can be centrifuged. If separation occurs during centrifugation the liquid portion (centrifugate) is filtered through the 0.45um filter prior to becoming mixed with the liquid portion of the waste obtained from the initial filtration. Any material that will not pass through the filter after centrifugation is considered a solid and is extracted.


COMBINED
WEIGHT
.33Kg
(.73lb)
(3.15cm)
(1.25")
15.25cm
(6")
SAMPLE
ELASTOMERIC *
SAMPLE HOLDER
7.1cm
(2.8")
3.3cm
(1.3")
9.4cm
(3.7")

*ELASTOMERIC SAMPLE HOLDER FABRICATED OF
MATERIAL FIRM ENOUGH TO SUPPORT THE SAMPLE

Figure 1

COMPACTION TESTER

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Appendix III—Chemical Analysis Test Methods

Tables 1, 2 and 3 specify the appropriate analytical procedures, described in "Test Methods for Evaluating Solid Waste" (SW–846), which should be used in determining whether the waste in question contains a given toxic constituent. Table 1 identifies the analytical class and the approved measurement techniques for each organic chemical listed in Appendix VII. Table 2 identifies the corresponding methods for the inorganic species. Table 3 identifies the specific sample preparation and measurement instrument introduction techniques which may be suitable for both the organic and inorganic species as well as the matrices of concern.

Prior to final selection of the analytical method the operator should consult the specific method descriptions in SW–846 for additional guidance on which of the approved methods should be employed for a specific waste analysis situation.

Table 1.—*Analytical Characteristics of Organic Chemicals*

Compound	Sample handling class/fraction	Non-GC methods	Measurement techniques		
				Conventional	
			GC/MS	GC	Detector
Acetonitrile	Volatile	—	8.24	8.03	NSD
Acrolein	Volatile	—	8.24	8.03	NSD
Acrylamide	Volatile	—	8.24	8.01	FID
Acrylonitrile	Volatile	—	8.24	8.03	NSD
Benzene	Volatile	—	8.24	8.02	PID
Benz(a)anthracene	Extractable/BN	8.10 (HPLC)	8.25	8.10	FID
Benzo(a)pyrene	Extractable/BN	8.10 (HPLC)	8.25	8.10	FID
Benzotrichloride	Extractable/BN	—	8.25	8.12	ECD
Benzyl chloride	Volatile or Extractable/BN	—	8.24	8.01	HSD
			8.25	8.12	ECD
Benz(b)fluoranthene	Extractable/BN	8.10 (HPLC)	8.25	8.10	FID
Bis(2-chloroethoxymethane)	Volatile	—	8.24	8.01	HSD
Bis(2-chloroethyl)ether	Volatile	—	8.24	8.01	HSD
Bis(2-chloroisopropyl)ether	Volatile	—	8.24	8.01	HSD
Carbon disulfide	Volatile	—	8.24	8.01	HSD
Carbon tetrachloride	Volatile	—	8.24	8.01	HSD
Chlordane	Extractable/BN	—	8.25	8.08	HSD
Chlorinated dibenzodioxins	Extractable/BN	—	8.25	8.08	ECD
Chlorinated biphenyls	Extractable/BN	—	8.25	8.08	HSD
Chloroacetaldehyde	Volatile	—	8.24	8.01	HSD
Chlorobenzene	Volatile	—	8.24	8.01	HSD
				8.02	PID
Chloroform	Volatile	—	8.24	8.01	HSD
Chloromethane	Volatile	—	8.24	8.01	HSD
2-Chlorophenol	Extractable/BN	—	8.25	8.04	FID, ECD
Chrysene	Extractable/BN	8.10 (HPLC)	8.25	8.10	FID
Creosote	Extractable/BN	—	[1]8.25	8.10	ECD
Cresol(s)	Extractable/A	—	8.25	8.04	FID, ECD
Cresylic acid(s)	Extractable/A	—	8.25	8.04	FID, ECD
Dichlorobenzene(s)	Extractable/BN	—	8.25	8.01	HSD
				8.02	PID
				8.12	ECD
Dichloroethane(s)	Volatile	—	8.24	8.01	HSD
Dichloromethane	Volatile	—	8.24	8.01	HSD
Dichlorophenoxy-acetic acid	Extractable/A	—	8.25	8.40	HSD
Dichloropropanol	Extractable/BN	—	8.25	8.12	ECD
2,4-Dimethylphenol	Extractable/A	—	8.25	8.04	FID, ECD
Dinitrobenzene	Extractable/BN	—	8.25	8.09	FID, ECD
4,6-Dinitro-o-cresol	Extractable/A	—	8.25	8.04	FID, ECD
2,4-Dinitrotoluene	Extractable/BN	—	8.25	8.09	FID, ECD
Endrin	Extractable/P	—	8.25	8.08	HSD
Ethyl ether	Volatile	—	8.24	8.01	FID
				8.02	FID
Formaldehyde	Volatile	—	8.24	8.01	FID
Formic acid	Extractable/BN	—	8.25	8.06	FID
Heptachlor	Extractable/P	—	8.25	8.06	HSD
Hexachlorobenzene	Extractable/BN	—	8.25	8.12	ECD
Hexachlorobutadiene	Extractable/BN	—	8.25	8.12	ECD
Hexachloroethane	Extractable/BN	—	8.25	8.12	ECD
Hexachlorocyclopentadiene	Extractable/BN	—	8.25	8.12	ECD
Lindane	Extractable/P	—	8.25	8.08	HSD
Maleic anhydride	Extractable/BN	—	8.25	8.06	ECD, FID
Methanol	Volatile	—	8.24	8.01	FID
Methomyl	Extractable/BN	8.32 (HPLC)			
Methyl ethyl ketone	Volatile	—	8.25	8.01	FID
				8.02	FID
Methyl isobutyl ketone	Volatile	—	8.25	8.01	FID
				8.02	FID
Naphthalene	Extractable/BN	—	8.25	8.10	FID
Napthoquinone	Extractable/BN	—	8.25	8.08	ECD, FID
				8.09	FID
Nitrobenzene	Extractable/BN	—	8.25	8.09	ECD, FID
4-Nitrophenol	Extractable/A	—	8.24	8.04	ECD, FID
Paraldehyde (trimer of acetaldehyde)	Volatile	—	8.24	8.01	FID

Table 1.—*Analytical Characteristics of Organic Chemicals—Continued*

Compound	Sample handling class/fraction	Non-GC methods	Measurement techniques GC/MS	Conventional GC	Conventional Detector
Pentachlorophenol	Extractable/A		8.25	8.04	ECD
Phenol	Extractable/A		8.25	8.04	ECD, FID
Phorate	Extractable/BN			8.22	FPD
Phosphorodithioic acid esters	Extractable/BN			8.06	ECD, FID
				8.09	ECD, FID
				8.22	FPD
Phthalic anhydride	Extractable/BN		8.25	8.06	ECD, FID
				8.09	ECD, FID
2-Picoline	Extractable/BN		8.25	8.06	ECD, FID
				8.09	ECD, FID
Pyridine	Extractable/BN		8.25	8.06	ECD, FID
				8.09	ECD, FID
Tetrachlorobenzene(s)	Extractable/BN		8.25	8.12	ECD
Tetrachloroethane(s)	Volatile		8.24	8.01	HSD
Tetrachloroethene	Volatile		8.24	8.01	HSD
Tetrachlorophenol	Extractable/A		8.24	8.04	ECD
Toluene	Volatile		8.24	8.02	PID
Toluenediamine	Extractable/BN		8.25		
Toluene diisocyanate(s)	Extractable/nonaqueous		8.25	8.06	FID
Toxaphene	Extractable/P		8.25	8.08	HSD
Trichloroethane	Volatile		8.24	8.01	HSD
Trichloroethene(s)	Volatile		8.24	8.01	HSD
Trichlorofluoromethane	Volatile		8.24	8.01	HSD
Trichlorophenol(s)	Extractable/A		8.25	8.04	HSD
2,4,5-TP (Silvex)	Extractable/A		8.25	8.40	HSD
Trichloropropane	Volatile		8.24	8.01	HSD
Vinyl chloride	Volatile		8.24	8.01	HSD
Vinylidene chloride	Volatile		8.24	8.01	HSD
Xylene	Volatile		8.24	8.02	PID

[1] Analyze for phenanthrene and carbazole; if these are present in a ratio between 1.4:1 and 5:1, creosote should be considered present.

ECD = Electron capture detector; FID = Flame ionization detector; FPD = Flame photometric detector; HSD = Halide specific detector; HPLC = High pressure liquid chromotography; NSD = Nitrogen-specific detector; PID = Photoionization detector.

Table 2—*Analytical Characteristics of Inorganic Species*

Species	Sample handling class	Measurement technique	Method number
Antimony	Digestion	Atomic absorbtion-furnace/flame	8.50
Arsenic	Hydride	Atomic absorbtion-flame	8.51
Barium	Digestion	Atomic absorbtion-furnace/flame	8.52
Cadmium	Digestion	Atomic absorbtion-furnace/flame	8.53
Chromium	Digestion	Atomic absorbtion-furnace/flame	8.54
Cyanides	Hydrolysis	Atomic absorbtion-spectroscopy	8.55
Lead	Digestion	Atomic absorbtion-furnace/flame	8.56
Mercury	Cold Vapor	Atomic absorbtion	8.57
Nickel	Digestion	Atomic absorbtion-furnace/flame	8.58
Selenium	Hydride digestion	Atomic absorbtion-furnace/flame	8.59
Silver	Digestion	Atomic absorbtion-furnace/flame	8.60

Table 3.—*Sample Prepartion/Sample Introduction Techniques*

Sample handling class	Physical characteristics of waste [1] Fluid	Paste	Solid
Volatile	Purge and trap. Direct injection.	Purge and trap. Headspace	Headspace.
Semivolatile and nonvolatile.	Direct injection. Shake out	Shake out	Shake out. Soxhlet. Sonication.
Inorganic	Direct injection. Digestion Hydride	Digestion Hydride	Digestion. Hydride.

[1] For purposes of this Table, fluid refers to readily pourable liquids, which may or may not contain suspended particles. Paste-like materials, while fluid in the sense of flowability, can be thought of as being thixotropic or plastic in nature, e.g. paints. Solid materials are those wastes which can be handled without a container (i.e., can be piled up without appreciable sagging).

Procedure and Method Number(s)

Digestion—See appropriate procedure for element of interest.

Direct injection—8.80

Headspace—8.82

Hydride—See appropriate procedure for element of interest.

Purge & Trap—8.83

Shake out—8.84

Sonication—8.85

Soxhlet—8.86

Appendix VII.—*Basis for Listing Hazardous Wastes*

EPA hazardous waste No.	Hazardous constituents for which listed
F001	tetrachloroethylene, methylene chloride trichloroethylene, 1,1,1-trichloroethane chlorinated fluorocarbons, carbon tetrachloride
F002	tetrachloroethylene, methylene chloride, trichloroethylene, 1,1,1-trichloroethane, chlorobenzene, 1,1,2-trichloro-1,2,2-trifluoroethane, o-dichlorobenzene, trichlorofluromethane
F003	N.A.
F004	cresols and cresylic acid, nitrobenzene
F005	methanol, toluene, methyl ethyl ketone, methyl isobutyl ketone, carbon disulfide, isobutanol, pyridine
F006	cadmium, chromium, nickel, cyanide (complexed)
F007	cyanide (salts)
F008	cyanide (salts)
F009	cyanide (salts)
F010	cyanide (salts)
F011	cyanide (salts)
F012	cyanide (complexed)
F013	cyanide (complexed)
F014	cyanide (complexed)
F015	cyanide (salts)
F016	cyanide (complexed)
K001	benzene, benz(a)anthracene, benzo(a)pyrene, chryseene, 4-nitrophenol, toluene, naphthalene phenol, 2-chlorophenol, 2,4-dimethyl phenol, 2,4,6-trichlorophenol, pentachlorophenol, 4,6-dinitro-o-cresol, tetrachlorophenol
K002	chromium, lead
K003	chromium, lead
K004	chromium
K005	chromium, lead
K006	chromium
K007	cyanide (complexed), chromium
K008	chromium
K009	chloroform, formaldehyde, methylene chloride, methyl chloride, paraldehyde, formic acid
K010	chloroform, formaldehyde, methylene chloride, methyl chloride, paraldehyde, formic acid, chloroacetaldehyde
K011	acrylonitrile, acetonitrile, hydrocyanic acid
K012	acrylonitrile, acetonitrile, acrolein, acrylamide
K013	hydrocyanic acid, acrylonitrile, acetonitrile
K014	acetonitrile, acrylamide
K015	benzyl chloride, chlorobenzene, toluene, benzotrichloride
K016	hexachlorobenzene, hexachlorobutadiene, carbon tetrachloride, hexachloroethane, perchloroethylene
K017	epichlorohydrin, chloroethers [bis(chloromethyl) ether and bis (2-chloroethyl) ethers], trichloropropane, dichloropropanols
K018	1,2-dichloroethane, trichloroethylene, hexachlorobutadiene, hexachlorobenzene
K019	ethylene dichloride, 1,1,1-trichloroethane, 1,1,2-trichloroethane, tetrachloroethanes (1,1,2,2-tetrachloroethane and 1,1,1,2-tetrachloroethane), trichloroethylene, tetrachloroethylene, carbon tetrachloride, chloroform, vinyl chloride, vinylidene chloride

Appendix VII.—*Basis for Listing Hazardous Wastes*—Continued

EPA hazardous waste No.	Hazardous constituents for which listed
K020	ethylene dichloride, 1,1,1-trichloroethane, 1,1,2-trichloroethane, tetrachloroethanes (1,1,2,2-tetrachloroethane and 1,1,1,2-tetrachloroethane), trichloroethylene, tetrachloroethylene, carbon tetrachloride, chloroform, vinyl chloride, vinylidene chloride
K021	antimony, carbon tetrachloride, chloroform
K022	phenol, tars (polycyclic aromatic hydrocarbons)
K023	phthalic anahydride, maleic anhydride
K024	phthalic anhydride, polynuclear tar-like materials, naphthoquinone
K025	meta-dinitrobenzene, 2,4-dinitrotoluene
K026	paraldehyde, pyridines, 2-picoline
K027	toulene diisocyanate, toluene-2,4-diamine, tars (benzidimidazapone)
K028	1,1,1-trichloroethane, vinyl chloride
K029	1,2.-dichloroethane, 1,1,1-trichloroethane, vinyl chloride, vinylidene chloride, chloroform
K030	hexachlorobenzene, hexachlorobutadiene, hexachloroethane, 1,1,1,2-tetrachloroethane, 1,1,2,2-tetrachloroethane, ethylene dichloride
K031	arsenic
K032	hexachlorocyclopentadiene
K033	hexachlorocyclopentadiene
K034	hexachlorocyclopentadiene
K035	cresote, benz(a)anthracene, benz(b)fluoranthene, benzo(a)pyrene
K036	toulene, phosphorodithioic and phosphorothioic acid esters
K037	toulene, phosphorodithioic and phosphorothioic acid esters
K038	phorate, formaldehyde, phosphorodithioic and phosphorothioic acid esters
K039	phosphorodithioic and phosphorothioic acid esters
K040	phorate, formaldehyde, phosphorodithioic and phosphorothioic acid esters
K041	toxaphene
K042	hexachlorobenzene; ortho-dichlorobenzene
K043	2,4-dichlorophenol, 2,6-dichlorophenol, 2,4,6-trichlorophenol
K044	N.A.
K045	N.A.
K046	lead
K047	N.A.
K048	chromium, lead
K049	chromium, lead
K050	chromium
K051	chromium, lead
K052	lead
K053	chromium
K054	chromium
K055	chromium, lead
K056	chromium, lead
K057	chromium, lead
K058	chromium, lead
K059	N.A.
K060	cyanide, naphthalene, phenolic compounds, arsenic
K061	chromium, lead, cadmium
K062	chromium, lead
K063	chromium, lead
K064	lead, cadmium
K065	lead, cadmium
K066	lead, cadmium
K067	lead, cadmium
K068	lead, cadmium
K069	chromium, lead, cadmium

N.A.—Waste is hazardous because it meets either the ignitability, corrosivity or reactivity characteristic.

Appendix VIII—Hazardous Constituents

Acetaldehyde
(Acetato)phenylmercury
Acetonitrile
3-(alpha-Acetonylbenzyl)-4-hydroxycoumarin and salts
2-Acetylaminofluorene
Acetyl chloride
1-Acetyl-2-thiourea
Acrolein
Acrylamide
Acrylonitrile
Aflatoxins
Aldrin
Allyl alcohol
Aluminum phosphide
4-Aminobiphenyl
6-Amino-1,1a,2,8,8a,8b-hexahydro-8-(hydroxymethyl)-8a-methoxy-5-methylcarbamate azirino(2',3':3,4) pyrrolo(1,2-a)indole-4,7-dione (ester) (Mitomycin C)
5-(Aminomethyl)-3-isoxazolol
4-Aminopyridine
Amitrole
Antimony and compounds, N.O.S.[1]
Aramite
Arsenic and compounds, N.O.S.
Arsenic acid
Arsenic pentoxide
Arsenic trioxide
Auramine
Azaserine
Barium and compounds, N.O.S.
Barium cyanide
Benz[c]acridine
Benz[a]anthracene
Benzene
Benzenearsonic acid
Benzenethiol
Benzidine
Benzo[a]anthracene
Benzo[b]fluoranthene
Benzo[j]fluoranthene
Benzo[a]pyrene
Benzotrichloride
Benzyl chloride
Beryllium and compounds, N.O.S.
Bis(2-chloroethoxy)methane
Bis(2-chloroethyl) ether
N,N-Bis(2-chloroethyl)-2-naphthylamine
Bis(2-chloroisopropyl) ether
Bis(chloromethyl) ether
Bis(2-ethylhexyl) phthalate
Bromoacetone
Bromomethane
4-Bromophenyl phenyl ether
Brucine
2-Butanone peroxide
Butyl benzyl phthalate
2-sec-Butyl-4,6-dinitrophenol (DNBP)
Cadmium and compounds, N.O.S.
Calcium chromate
Calcium cyanide
Carbon disulfide
Chlorambucil
Chlordane (alpha and gamma isomers)
Chlorinated benzenes, N.O.S.
Chlorinated ethane, N.O.S.
Chlorinated naphthalene, N.O.S.
Chlorinated phenol, N.O.S.
Chloroacetaldehyde
Chloroalkyl ethers
p-Chloroaniline
Chlorobenzene
Chlorobenzilate
1-(p-Chlorobenzoyl)-5-methoxy-2-methylindole-3-acetic acid
p-Chloro-m-cresol
1-Chloro-2,3-epoxybutane
2-Chloroethyl vinyl ether
Chloroform
Chloromethane
Chloromethyl methyl ether
2-Chloronaphthalene
2-Chlorophenol
1-(o-Chlorophenyl)thiourea
3-Chloropropionitrile
alpha-Chlorotoluene
Chlorotoluene, N.O.S.
Chromium and compounds, N.O.S.
Chrysene
Citrus red No. 2
Copper cyanide
Creosote
Crotonaldehyde
Cyanides (soluble salts and complexes), N.O.S.
Cyanogen
Cyanogen bromide
Cyanogen chloride
Cycasin
2-Cyclohexyl-4,6-dinitrophenol
Cyclophosphamide
Daunomycin
DDD
DDE
DDT
Diallate
Dibenz[a,h]acridine
Dibenz[a,j]acridine
Dibenz[a,h]anthracene(Dibenzo[a,h] anthracene)
7H-Dibenzo[c,g]carbazole
Dibenzo[a,e]pyrene
Dibenzo[a,h]pyrene
Dibenzo[a,i]pyrene
1,2-Dibromo-3-chloropropane
1,2-Dibromoethane
Dibromomethane
Di-n-butyl phthalate
Dichlorobenzene, N.O.S.
3,3'-Dichlorobenzidine
1,1-Dichloroethane
1,2-Dichloroethane
trans-1,2-Dichloroethane
Dichloroethylene, N.O.S.
1,1-Dichloroethylene
Dichloromethane
2,4-Dichlorophenol
2,6-Dichlorophenol
2,4-Dichlorophenoxyacetic acid (2,4-D)
Dichloropropane
Dichlorophenylarsine
1,2-Dichloropropane
Dichloropropanol, N.O.S.
Dichloropropene, N.O.S.
1,3-Dichloropropene
Dieldrin
Diepoxybutane
Diethylarsine
0,0-Diethyl-S-(2-ethylthio)ethyl ester of phosphorothioic acid
1,2-Diethylhydrazine
0,0-Diethyl-S-methylester phosphorodithioic acid
0,0-Diethylphosphoric acid, 0-p-nitrophenyl ester
Diethyl phthalate
0,0-Diethyl-0-(2-pyrazinyl)phosphorothioate
Diethylstilbestrol
Dihydrosafrole
3,4-Dihydroxy-alpha-(methylamino)-methyl benzyl alcohol
Di-isopropylfluorophosphate (DFP)
Dimethoate
3,3'-Dimethoxybenzidine
p-Dimethylaminoazobenzene
7,12-Dimethylbenz[a]anthracene
3,3'-Dimethylbenzidine
Dimethylcarbamoyl chloride

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[1] The abbreviation N.O.S. signifies those members of the general class "not otherwise specified" by name in this listing.

1,1-Dimethylhydrazine
1,2-Dimethylhydrazine
3,3-Dimethyl-1-(methylthio)-2-butanone-0-((methylamino) carbonyl)oxime
Dimethylnitrosoamine
alpha,alpha-Dimethylphenethylamine
2,4-Dimethylphenol
Dimethyl phthalate
Dimethyl sulfate
Dinitrobenzene, N.O.S.
4,6-Dinitro-o-cresol and salts
2,4-Dinitrophenol
2,4-Dinitrotoluene
2,6-Dinitrotoluene Di-n-octyl phthalate
1,4-Dioxane
1,2-Diphenylhydrazine
Di-n-propylnitrosamine
Disulfoton
2,4-Dithiobiuret
Endosulfan
Endrin and metabolites
Epichlorohydrin
Ethyl cyanide
Ethylene diamine
Ethylenebisdithiocarbamate (EBDC)
Ethyleneimine
Ethylene oxide
Ethylenethiourea
Ethyl methanesulfonate
Fluoranthene
Fluorine
2-Fluoroacetamide
Fluoroacetic acid, sodium salt
Formaldehyde
Glycidylaldehyde
Halomethane, N.O.S.
Heptachlor
Heptachlor epoxide (alpha, beta, and gamma isomers)
Hexachlorobenzene
Hexachlorobutadiene
Hexachlorocyclohexane (all isomers)
Hexachlorocyclopentadiene
Hexachloroethane
1,2,3,4,10,10-Hexachloro-1,4,4a,5,8,8a-hexahydro-1,4:5,8-endo,endo-dimethanonaphthalene
Hexachlorophene
Hexachloropropene
Hexaethyl tetraphosphate
Hydrazine
Hydrocyanic acid
Hydrogen sulfide
Indeno(1,2,3-c,d)pyrene
Iodomethane
Isocyanic acid, methyl ester
Isosafrole
Kepone
Lasiocarpine
Lead and compounds, N.O.S.
Lead acetate
Lead phosphate
Lead subacetate
Maleic anhydride
Malononitrile
Melphalan
Mercury and compounds, N.O.S.
Methapyrilene
Methomyl
2-Methylaziridine
3-Methylcholanthrene
4,4'-Methylene-bis-(2-chloroaniline)
Methyl ethyl ketone (MEK)
Methyl hydrazine
2-Methyllactonitrile
Methyl methacrylate
Methyl methanesulfonate
2-Methyl-2-(methylthio)propionaldehyde-o-(methylcarbonyl) oxime
N-Methyl-N'-nitro-N-nitrosoguanidine
Methyl parathion
Methylthiouracil
Mustard gas
Naphthalene
1,4-Naphthoquinone
1-Naphthylamine
2-Naphthylamine
1-Naphthyl-2-thiourea
Nickel and compounds, N.O.S.
Nickel carbonyl
Nickel cyanide
Nicotine and salts
Nitric oxide
p-Nitroaniline
Nitrobenzene
Nitrogen dioxide
Nitrogen mustard and hydrochloride salt
Nitrogen mustard N-oxide and hydrochloride salt
Nitrogen peroxide
Nitrogen tetroxide
Nitroglycerine
4-Nitrophenol
4-Nitroquinoline-1-oxide
Nitrosamine, N.O.S.
N-Nitrosodi-N-butylamine
N-Nitrosodiethanolamine
N-Nitrosodiethylamine
N-Nitrosodimethylamine
N-Nitrosodiphenylamine
N-Nitrosodi-N-propylamine
N-Nitroso-N-ethylurea
N-Nitrosomethylethylamine
N-Nitroso-N-methylurea
N-Nitroso-N-methylurethane
N-Nitrosomethylvinylamine
N-Nitrosomorpholine
N-Nitrosonornicotine
N-Nitrosopiperidine
N-Nitrosopyrrolidine
N-Nitrososarcosine
5-Nitro-o-toluidine
Octamethylpyrophosphoramide
Oleyl alcohol condensed with 2 moles ethylene oxide
Osmium tetroxide
7-Oxabicyclo[2.2.1]heptane-2,3-dicarboxylic acid
Parathion
Pentachlorobenzene
Pentachloroethane
Pentachloronitrobenzene (PCNB)
Pentacholorophenol
Phenacetin
Phenol
Phenyl dichloroarsine
Phenylmercury acetate
N-Phenylthiourea
Phosgene
Phosphine
Phosphorothioic acid, O,O-dimethyl ester, O-ester with N,N-dimethyl benzene sulfonamide
Phthalic acid esters, N.O.S.
Phthalic anhydride
Polychlorinated biphenyl, N.O.S.
Potassium cyanide
Potassium silver cyanide
Pronamide
1,2-Propanediol
1,3-Propane sultone
Propionitrile
Propylthiouracil
2-Propyn-1-ol
Pryidine
Reserpine
Saccharin
Safrole
Selenious acid
Selenium and compounds, N.O.S.
Selenium sulfide
Selenourea
Silver and compounds, N.O.S.
Silver cyanide
Sodium cyanide
Streptozotocin
Strontium sulfide
Strychnine and salts
1,2,4,5-Tetrachlorobenzene
2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD)
Tetrachloroethane, N.O.S.
1,1,1,2-Tetrachloroethane
1,1,2,2-Tetrachloroethane
Tetrachloroethene (Tetrachloroethylene)
Tetrachloromethane
2,3,4,6-Tetrachlorophenol
Tetraethyldithiopyrophosphate
Tetraethyl lead
Tetraethylpyrophosphate
Thallium and compounds, N.O.S.
Thallic oxide
Thallium (I) acetate
Thallium (I) carbonate
Thallium (I) chloride
Thallium (I) nitrate
Thallium selenite
Thallium (I) sulfate
Thioacetamide
Thiosemicarbazide
Thiourea
Thiuram
Toluene
Toluene diamine
o-Toluidine hydrochloride
Tolylene diisocyanate
Toxaphene
Tribromomethane
1,2,4-Trichlorobenzene
1,1,1-Trichloroethane
1,1,2-Trichloroethane
Trichloroethene (Trichloroethylene)
Trichloromethanethiol
2,4,5-Trichlorophenol
2,4,6-Trichlorophenol
2,4,5-Trichlorophenoxyacetic acid (2,4,5-T)
2,4,5-Trichlorophenoxypropionic acid (2,4,5-TP) (Silvex)
Trichloropropane, N.O.S.
1,2,3-Trichloropropane
0,0,0-Triethyl phosphorothioate
Trinitrobenzene
Tris(1-azridinyl)phosphine sulfide
Tris(2,3-dibromopropyl) phosphate
Trypan blue
Uracil mustard
Urethane
Vanadic acid, ammonium salt
Vanadium pentoxide (dust)
Vinyl chloride
Vinylidene chloride
Zinc cyanide
Zinc phosphide

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PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

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Appendix—Form

Annual Report (EPA Form 8700–13).

Authority: Secs. 2002(a), 3001, 3002, 3003, 3004, and 3005 of the Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act of 1976 and as amended by the Quiet Communities Act of 1978, (42 U.S.C. 6912(a), 6921, 6922, 6923, 6924, 6925)

Subpart A—General

§ 262.10 Purpose, scope, and applicability.

(a) These regulations establish standards for generators of hazardous waste.

(b) A generator who treats, stores, or disposes of hazardous waste on-site must only comply with the following sections of this Part with respect to that waste: Section 262.11 for determining whether or not he has a hazardous waste, § 262.12 for obtaining an EPA identification number, § 262.40(c) and (d) for Recordkeeping, § 262.43 for additional reporting and if applicable, § 262.51 for Farmers.

(c) Any person who imports hazardous waste into the United States must comply with the standards applicable to generators established in this Part.

(d) A farmer who generates waste pesticides which are hazardous waste and who complies with all of the requirements of § 262.51 is not required to comply with other standards in this Part or 40 CFR Parts 122, 264, or 265 with respect to such pesticides.

(e) A person who generates a hazardous waste as defined by 40 CFR Part 261 is subject to the compliance requirements and penalties prescribed in Section 3008 of the Act if he does not comply with the requirements of this Part.

Note.— A generator who treats, stores, or disposes of hazardous waste on-site must comply with the applicable standards and permit requirements set forth in 40 CFR Parts 264, 265, and 266 and Part 122.

§ 262.11 Hazardous waste determination.

A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste using the following method:

(a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4 and 261.5.

(b) He must then determine if the waste is listed as a hazardous waste in Subpart D of 40 CFR Part 261.

Note.— Even if the waste is listed, the generator still has an opportunity under 40 CFR 260.22 to demonstrate to the Administrator that the waste from his particular facility or operation is not a hazardous-waste.

(c) If the waste is not listed as a hazardous waste in Subpart D of 40 CFR Part 261, he must determine whether the waste is identified in Subpart C of 40 CFR Part 261 by either:

(1) Testing the waste according to the methods set forth in Subpart C of 40 CFR Part 261, or according to an equivalent method approved by the Administrator under 40 CFR 260.21; or

(2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.

§ 262.12 EPA identification numbers.

(a) A generator must not treat, store, dispose of, transport, or offer for transportation, hazardous waste without having received an EPA identification number from the Administrator.

(b) A generator who has not received an EPA identification number may obtain one by applying to the Administrator using EPA form 8700–12. Upon receiving the request the Administrator will assign an EPA identification number to the generator.

(c) A generator must not offer his hazardous waste to transporters or to treatment, storage, or disposal facilities that have not received an EPA identification number.

Subpart B—The Manifest

§ 262.20 General requirements.

(a) A generator who transports, or offers for transportation, hazardous waste for off-site treatment, storage, or disposal must prepare a manifest before transporting the waste off-site.

(b) A generator must designate on the manifest one facility which is permitted to handle the waste described on the manifest.

(c) A generator may also designate on the manifest one alternate facility which is permitted to handle his waste in the event an emergency prevents delivery of the waste to the primary designated facility.

(d) If the transporter is unable to deliver the hazardous waste to the designated facility or the alternate facility, the generator must either designate another facility or instruct the transporter to return the waste.

§ 262.21 Required information.

(a) the manifest must contain all of the following information:

(1) A manifest document number;

(2) The generator's name, mailing address, telephone number, and EPA identification number;

(3) The name and EPA identification number of each transporter;

(4) The name, address and EPA identification number of the designated facility and an alternate facility, if any;

(5) The description of the waste(s) (e.g., proper shipping name, etc.) required by regulations of the U.S. Department of Transportation in 49 CFR 172.101, 172.202, and 172.203;

(6) The total quantity of each hazardous waste by units of weight or volume, and the type and number of containers as loaded into or onto the transport vehicle.

(b) The following certification must appear on the manifest: "This is to certify that the above named materials are properly classified, described, packaged, marked, and labeled and are in proper condition for transportation according to the applicable regulations of the Department of Transportation and the EPA."

§ 262.22 Number of copies.

The manifest consists of at least the number of copies which will provide the generator, each transporter, and the owner or operator of the designated facility with one copy each for their records and another copy to be returned to the generator.

§ 262.23 Use of the manifest.

(a) The generator must:

(1) Sign the manifest certification by hand; and

(2) Obtain the handwritten signature of the initial transporter and date of acceptance on the manifest; and

(3) Retain one copy, in accordance with § 262.40(a).

(b) The generator must give the transporter the remaining copies of the manifest.

(c) For shipment of hazardous waste within the United States solely by railroad or solely by water (bulk shipments only), the generator must send three copies of the manifest dated and signed in accordance with this section to the owner or operator of the designated facility. Copies of the manifest are not required for each transporter.

Note.—See § 263.20(e) for special provisions for rail or water (bulk shipment) transporters who deliver hazardous waste by rail or water to the designated facility.

Subpart C—Pre-Transport Requirements

§ 262.30 Packaging.

Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must package the waste in accordance with the applicable Department of Transportation regulations on packaging under 49 CFR Parts 173, 178, and 179.

§ 262.31 Labeling.

Before transporting or offering hazardous waste for transportation off-site, a generator must label each package in accordance with the applicable Department of Transportation regulations on hazardous materials under 49 CFR Part 172.

§ 262.32 Marking.

(a) Before transporting or offering hazardous waste for transportation off-site, a generator must mark each package of hazardous waste in accordance with the applicable Department of Transportation regulations on hazardous materials under 49 CFR Part 172;

(b) Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must mark each container of 110 gallons or less used in such transportation with the following words and information displayed in accordance with the requirements of 49 CFR 172.304:

> HAZARDOUS WASTE—Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency.
>
> Generator's Name and Address ————.
> Manifest Document Number ————.

§ 262.33 Placarding.

Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must placard or offer the initial transporter the appropriate placards according to Department of Transportation regulations for hazardous materials under 49 CFR Part 172, Subpart F.

§ 262.34 Accumulation time.

(a) A generator may accumulate hazardous waste on-site without a permit for 90 days or less, provided that:

(1) All such waste is shipped off-site in 90 days or less;

(2) The waste is placed in containers which meet the standards of § 262.30 and are managed in accordance with 40 CFR 265.174 and 265.176 or in tanks, provided the generator complies with the requirements of Subpart J of 40 CFR Part 265 except § 265.193;

(3) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(4) Each container is properly labeled and marked according to § 262.31 and § 262.32; and

(5) The generator complies with the requirements for owners or operators in Subparts C and D in 40 CFR Part 265 and with § 265.16.

(b) A generator who accumulates hazardous waste for more than 90 days

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

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262.40 Recordkeeping.
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262.42 Exception reporting.
262.43 Additional reporting.

Subpart E—Special Conditions

262.50 International shipments.
262.51 Farmers.

Appendix—Form

Annual Report (EPA Form 8700-13).

Authority: Secs. 2002(a), 3001, 3002, 3003, 3004, and 3005 of the Solid Waste Disposal Act, as amended by Resource Conservation and Recovery Act of 1976 and as amended by the Quiet Communities Act of 1978, (42 U.S.C. 6912(a), 6921, 6922, 6923, 6924, 6925)

Subpart A—General

§ 262.10 Purpose, scope, and applicability.

(a) These regulations establish standards for generators of hazardous waste.

(b) A generator who treats, stores, or disposes of hazardous waste on-site must only comply with the following sections of this Part with respect to that waste: Section 262.11 for determining whether or not he has a hazardous waste, § 262.12 for obtaining an EPA identification number, § 262.40(c) and (d) for Recordkeeping, § 262.43 for additional reporting and if applicable, § 262.51 for Farmers.

(c) Any person who imports hazardous waste into the United States must comply with the standards applicable to generators established in this Part.

(d) A farmer who generates waste pesticides which are hazardous waste and who complies with all of the requirements of § 262.51 is not required to comply with other standards in this Part or 40 CFR Parts 122, 264, or 265 with respect to such pesticides.

(e) A person who generates a hazardous waste as defined by 40 CFR Part 261 is subject to the compliance requirements and penalties prescribed in Section 3008 of the Act if he does not comply with the requirements of this Part.

Note.— A generator who treats, stores, or disposes of hazardous waste on-site must comply with the applicable standards and permit requirements set forth in 40 CFR Parts 264, 265, and 266 and Part 122.

§ 262.11 Hazardous waste determination.

A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste using the following method:

(a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4 and 261.5.

(b) He must then determine if the waste is listed as a hazardous waste in Subpart D of 40 CFR Part 261.

Note.— Even if the waste is listed, the generator still has an opportunity under 40 CFR 260.22 to demonstrate to the Administrator that the waste from his particular facility or operation is not a hazardous waste.

(c) If the waste is not listed as a hazardous waste in Subpart D of 40 CFR Part 261, he must determine whether the waste is identified in Subpart C of 40 CFR Part 261 by either:

(1) Testing the waste according to the methods set forth in Subpart C of 40 CFR Part 261, or according to an equivalent method approved by the Administrator under 40 CFR 260.21; or

(2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.

§ 262.12 EPA identification numbers.

(a) A generator must not treat, store, dispose of, transport, or offer for transportation, hazardous waste without having received an EPA identification number from the Administrator.

(b) A generator who has not received an EPA identification number may obtain one by applying to the Administrator using EPA form 8700-12. Upon receiving the request the Administrator will assign an EPA identification number to the generator.

(c) A generator must not offer his hazardous waste to transporters or to treatment, storage, or disposal facilities that have not received an EPA identification number.

Subpart B—The Manifest

§ 262.20 General requirements.

(a) A generator who transports, or offers for transportation, hazardous waste for off-site treatment, storage, or disposal must prepare a manifest before transporting the waste off-site.

(b) A generator must designate on the manifest one facility which is permitted to handle the waste described on the manifest.

(c) A generator may also designate on the manifest one alternate facility which is permitted to handle his waste in the event an emergency prevents delivery of the waste to the primary designated facility.

(d) If the transporter is unable to deliver the hazardous waste to the designated facility or the alternate facility, the generator must either designate another facility or instruct the transporter to return the waste.

§ 262.21 Required information.

(a) the manifest must contain all of the following information:

(1) A manifest document number;

(2) The generator's name, mailing address, telephone number, and EPA identification number;

(3) The name and EPA identification number of each transporter;

(4) The name, address and EPA identification number of the designated facility and an alternate facility, if any;

(5) The description of the waste(s) (e.g., proper shipping name, etc.) required by regulations of the U.S. Department of Transportation in 49 CFR 172.101, 172.202, and 172.203;

(6) The total quantity of each hazardous waste by units of weight or volume, and the type and number of containers as loaded into or onto the transport vehicle.

(b) The following certification must appear on the manifest: "This is to certify that the above named materials are properly classified, described, packaged, marked, and labeled and are in proper condition for transportation according to the applicable regulations of the Department of Transportation and the EPA."

§ 262.22 Number of copies.

The manifest consists of at least the number of copies which will provide the generator, each transporter, and the owner or operator of the designated facility with one copy each for their records and another copy to be returned to the generator.

§ 262.23 Use of the manifest.

(a) The generator must:

(1) Sign the manifest certification by hand; and

(2) Obtain the handwritten signature of the initial transporter and date of acceptance on the manifest; and

(3) Retain one copy, in accordance with § 262.40(a).

(b) The generator must give the transporter the remaining copies of the manifest.

(c) For shipment of hazardous waste within the United States solely by railroad or solely by water (bulk shipments only), the generator must send three copies of the manifest dated and signed in accordance with this section to the owner or operator of the designated facility. Copies of the manifest are not required for each transporter.

Note.—See § 263.20(e) for special provisions for rail or water (bulk shipment) transporters who deliver hazardous waste by rail or water to the designated facility.

Subpart C—Pre-Transport Requirements

§ 262.30 Packaging.

Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must package the waste in accordance with the applicable Department of Transportation regulations on packaging under 49 CFR Parts 173, 178, and 179.

§ 262.31 Labeling.

Before transporting or offering hazardous waste for transportation off-site, a generator must label each package in accordance with the applicable Department of Transportation regulations on hazardous materials under 49 CFR Part 172.

§ 262.32 Marking.

(a) Before transporting or offering hazardous waste for transportation off-site, a generator must mark each package of hazardous waste in accordance with the applicable Department of Transportation regulations on hazardous materials under 49 CFR Part 172;

(b) Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must mark each container of 110 gallons or less used in such transportation with the following words and information displayed in accordance with the requirements of 49 CFR 172.304:

HAZARDOUS WASTE—Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency.

Generator's Name and Address ———.

Manifest Document Number ———.

§ 262.33 Placarding.

Before transporting hazardous waste or offering hazardous waste for transportation off-site, a generator must placard or offer the initial transporter the appropriate placards according to Department of Transportation regulations for hazardous materials under 49 CFR Part 172, Subpart F.

§ 262.34 Accumulation time.

(a) A generator may accumulate hazardous waste on-site without a permit for 90 days or less, provided that:

(1) All such waste is shipped off-site in 90 days or less;

(2) The waste is placed in containers which meet the standards of § 262.30 and are managed in accordance with 40 CFR 265.174 and 265.176 or in tanks, provided the generator complies with the requirements of Subpart J of 40 CFR Part 265 except § 265.193;

(3) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(4) Each container is properly labeled and marked according to § 262.31 and § 262.32; and

(5) The generator complies with the requirements for owners or operators in Subparts C and D in 40 CFR Part 265 and with § 265.16.

(b) A generator who accumulates hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of 40 CFR Parts 264 and 265 and the permit requirements of 40 CFR Part 122.

Subpart D—Recordkeeping and Reporting

§ 262.40 Recordkeeping.

(a) A generator must keep a copy of each manifest signed in accordance with § 262.23(a) for three years or until he receives a signed copy from the designated facility which received the waste. This signed copy must be retained as a record for at least three years from the date the waste was accepted by the initial transporter.

(b) A generator must keep a copy of each Annual Report and Exception Report for a period of at least three years from the due date of the report (March 1).

(c) A generator must keep records of any test results, waste analyses, or other determinations made in accordance with § 262.11 for at least three years from the date that the waste was last sent to on-site or off-site treatment, storage, or disposal.

(d) The periods or retention referred to in this section are extended automatically during the course of any unresolved enforcement action regarding the regulated activity or as requested by the Administrator.

§ 262.41 Annual reporting.

(a) A generator who ships his hazardous waste off-site must submit Annual Reports:

(1) On EPA forms 8700-13 and 8700-13A according to the instructions on the form (See the Appendix to this Part);

(2) To the Regional Administrator for the Region in which the generator is located;

(3) No later than March 1 for the preceding calendar year.

(b) Any generator who treats, stores, or disposes of hazardous waste on-site must submit an Annual Report covering those wastes in accordance with the provisions of 40 CFR Parts 264, 265, and 266 and 40 CFR Part 122.

§ 262.42 Exception reporting.

(a) A generator who does not receive a copy of the manifest with the handwritten signature of the owner or operator of the designated facility within 35 days of the date the waste was accepted by the initial transporter must contact the transporter and/or the owner or operator of the designated facility to determine the status of the hazardous waste.

(b) A generator must submit an Exception Report to the EPA Regional Administrator for the Region in which the generator is located if he has not received a copy of the manifest with the handwritten signature of the owner or operator of the designated facility within 45 days of the date the waste was accepted by the initial transporter. The Exception Report must include:

(1) A legible copy of the manifest for which the generator does not have confirmation of delivery;

(2) A cover letter signed by the generator or his authorized representative explaining the efforts taken to locate the hazardous waste and the results of those efforts.

§ 262.43 Additional reporting.

The Administrator, as he deems necessary under section 2002(a) and section 3002(6) of the Act, may require generators to furnish additional reports concerning the quantities and disposition of wastes identified or listed in 40 CFR Part 261.

Subpart E—Special Conditions

§ 262.50 International shipments.

(a) Any person who exports hazardous waste to a foreign country or imports hazardous waste from a foreign country into the United States must comply with the requirements of this Part and with the special requirements of this section.

(b) When shipping hazardous waste outside the United States, the generator must:

(1) Notify the Administrator in writing four weeks before the initial shipment of hazardous waste to each country in each calendar year;

(i) The waste must be identified by its EPA hazardous waste identification number and its DOT shipping description;

(ii) The name and address of the foreign consignee must be included in this notice;

(iii) These notices must be sent to: Hazardous Waste Export, Division for Oceans and Regulatory Affairs (A-107), United States Environmental Protection Agency, Washington, D.C. 20460.

Note.—This requirement to notify will not be delegated to States authorized under 40 CFR Part 123. Therefore, all generators must notify the Administrator as required above.

(2) Require that the foreign consignee confirm the delivery of the waste in the foreign country. A copy of the manifest signed by the foreign consignee may be used for this purpose;

(3) Meet the requirements under § 262.21 for the manifest, except that:

(i) In place of the name, address, and EPA identification number of the designated facility, the name and address of the foreign consignee must be used;

(ii) The generator must identify the point of departure from the United States through which the waste must travel before entering a foreign country.

(c) A generator must file an Exception Report, if:

(1) He has not received a copy of the manifest signed by the transporter stating the date and place of departure from the United States within 45 days from the date it was accepted by the initial transporter; or

(2) Within 90 days from the date the waste was accepted by the initial transporter, the generator has not received written confirmation from the foreign consignee that the hazardous waste was received.

(d) When importing hazardous waste, a person must meet all requirements of § 262.21 for the manifest except that:

(1) In place of the generator's name, address and EPA identification number, the name and address of the foreign generator and the importer's name, address and EPA identification number must be used.

(2) In place of the generator's signature on the certification statement, the U.S. importer or his agent must sign and date the certification and obtain the signature of the initial transporter.

§ 262.51 Farmers.

A farmer disposing of waste pesticides from his own use which are hazardous wastes is not required to comply with the standards in this Part or other standards in 40 CFR Parts 122, 264 or 265 for those wastes provided he triple rinses each emptied pesticide container in accordance with § 261.33(c) and disposes of the pesticide residues on his own farm in a manner consistent with the disposal instructions on the pesticide label.

Appendix—Form—Annual Report (EPA Form 8700-13)

BILLING CODE 6560-01-M

GSA No. 12345-XX
Form Approved OMB No. 158-R00XX

Please print or type with ELITE type *(12 characters per inch)*.

EPA U.S. ENVIRONMENTAL PROTECTION AGENCY

HAZARDOUS WASTE REPORT

PLEASE PLACE LABEL IN THIS SPACE

I. TYPE OF HAZARDOUS WASTE REPORT

PART A: GENERATOR ANNUAL REPORT

THIS REPORT IS FOR THE YEAR ENDING DEC. 31, 19__

PART B: FACILITY ANNUAL REPORT

THIS REPORT FOR YEAR ENDING DEC. 31, 19__

PART C: UNMANIFESTED WASTE REPORT

THIS REPORT IS FOR A WASTE RECEIVED *(day, mo., & yr.)* __-__-19__

INSTRUCTIONS: You may have received a preprinted label attached to the front of this pamphlet; affix it in the designated space above—left. If any of the information on the label is incorrect, draw a line through it and supply the correct information in the appropriate section below. If the label is complete and correct, leave Sections II, III, and IV below blank. If you did not receive a preprinted label, complete all sections. "Installation" means a single site where hazardous waste is generated, treated, stored, or disposed of. Please refer to the specific instructions for generators or facilities before completing this form. The information requested herein is required by law *(Section 3002/3004 of the Resource Conservation and Recovery Act)*.

II. INSTALLATION'S EPA I.D. NUMBER

F ______________ 1

III. NAME OF INSTALLATION

IV. INSTALLATION MAILING ADDRESS

STREET OR P.O. BOX

3

CITY OR TOWN | ST. | ZIP CODE

4

V. LOCATION OF INSTALLATION

STREET OR ROUTE NUMBER

5

CITY OR TOWN | ST. | ZIP CODE

6

VI. INSTALLATION CONTACT

NAME *(last and first)* | PHONE NO. *(area code & no.)*

2

VII. TRANSPORTATION SERVICES USED *(for Part A reports only)*

List the EPA Identification Numbers for those transporters whose services were used during the reporting year represented by this report.

VIII. COST ESTIMATES FOR FACILITIES *(for Part B reports only)*

A. COST ESTIMATE FOR FACILITY CLOSURE	B. COST ESTIMATE FOR POST CLOSURE MONITORING AND MAINTENANCE *(disposal facilities only)*
G $ ___,___,___	$ ___,___,___

IX. CERTIFICATION

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

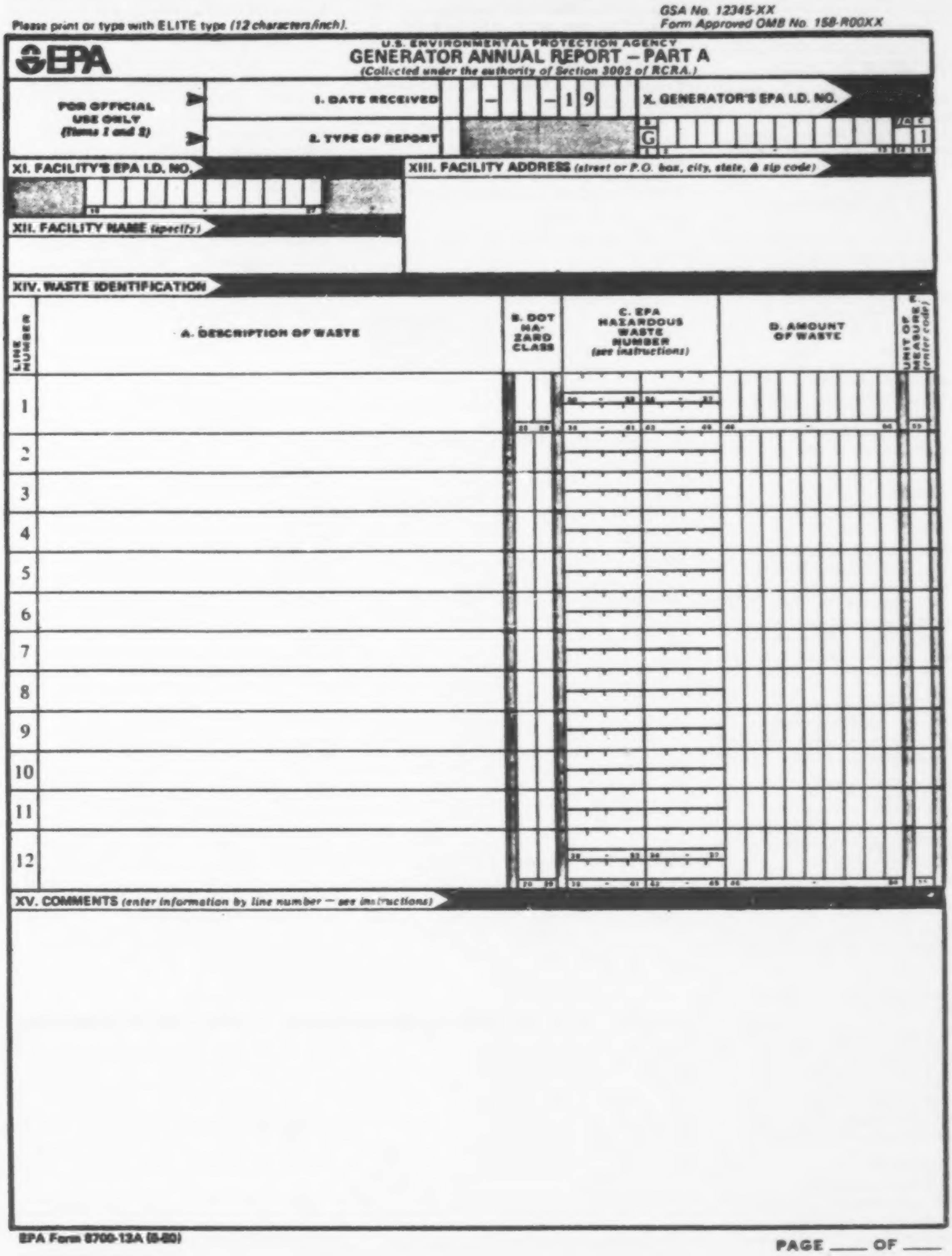
A. PRINT OR TYPE NAME ____________

B. SIGNATURE ____________

C. DATE SIGNED ____________

EPA Form 8700-13 (5-80)

PAGE 1 OF ____



GSA No. 12345-XX
Form Approved OMB No. 158-R00XX

Please print or type with ELITE type *(12 characters/inch).*

EPA

U.S. ENVIRONMENTAL PROTECTION AGENCY

GENERATOR ANNUAL REPORT – PART A

(Collected under the authority of Section 3002 of RCRA.)

FOR OFFICIAL USE ONLY *(Items 1 and 2)*

1. DATE RECEIVED ☐☐ – ☐☐ – 19☐☐

2. TYPE OF REPORT ☐

X. GENERATOR'S EPA I.D. NO. G☐☐☐☐☐☐☐☐☐☐☐ ☐ 1

XI. FACILITY'S EPA I.D. NO. ☐☐☐☐☐☐☐☐☐☐☐☐

XII. FACILITY NAME *(specify)*

XIII. FACILITY ADDRESS *(street or P.O. box, city, state, & zip code)*

XIV. WASTE IDENTIFICATION

LINE NUMBER	A. DESCRIPTION OF WASTE	B. DOT HAZARD CLASS	C. EPA HAZARDOUS WASTE NUMBER *(see instructions)*	D. AMOUNT OF WASTE	E. UNIT OF MEASURE *(enter code)*
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					

XV. COMMENTS *(enter information by line number – see instructions)*

EPA Form 8700-13A (6-80)

PAGE ____ OF ____

BILLING CODE 6560-01-C

General Instructions, Hazardous Waste Report (EPA Form 8700-13)

Important: READ ALL INSTRUCTIONS BEFORE COMPLETING THIS FORM.

Section I. Type of Hazardous Waste Report

Part A: Generator Annual Report—For generators who ship their waste off-site to facilities which they do not own or operate, fill in the reporting year for this report (e.g., 1982).

Note.—Generators who ship hazardous waste off-site to a facility which they own or operate must complete the facility (Part B) report instead of the Part A report.

Part B: Facility Annual Report—For owners or operators of on-site or off-site facilities that treat, store, or dispose of hazardous waste, fill in the reporting year for this report (e.g., 1982).

Part C: Unmanifested Waste Report—For facility owners or operators who accept for treatment, storage, or disposal any hazardous waste from an off-site source without an accompanying manifest, fill in the date the waste was received at the facility (e.g. 04-12-1982).

Section II thru Section IV. Installation I.D. Number, Name of Installation, and Installation Mailing Address

If you received a preprinted label from EPA, attach it in the space provided and leave Sections II through IV blank. If there is an error or omission on the label, cross out the incorrect information and fill in the appropriate item(s). If you did not receive a preprinted label, complete Section II through Section IV.

Section V. Location of Installation

If your installation location address is different than the mailing address, enter the location address of your installation.

Section VI. Installation Contact

Enter the name (last and first) and telephone number of the person who may be contacted regarding information contained in this report.

Section VII. Transportation Services Used (For Part A Reports ONLY)

List the EPA Identification Number for each transporter whose services you used during the reporting year.

Section VIII. Cost Estimates for Facilities (For Part B Reports ONLY)

A. Enter the most recent cost estimate for facility closure in dollars. See Subpart H of 40 CFR Parts 264 or 265 for more detail.

B. For disposal facilities only, enter the most recent cost estimate for post closure monitoring and maintenance. See Subpart H of 40 CFR Parts 264 or 265 for more detail.

Section IX. Certification

The generator or his authorized representative (Part A reports) or the owner or operator of the facility or his authorized representative (Parts B and C reports) must sign and date the certification where indicated. The printed or typed name of the person signing the report must also be included where indicated.

Note.—Since more than one page is required for each report, enter the page number of each sheet in the lower right corner as well as the total number of pages.

Generator Annual Report, Part A Instructions (EPA Form 8700-13A)

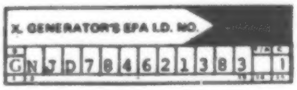
Generator Annual Report for generators who ship their hazardous waste off-site to facilities which they do not own or operate.

Important: READ ALL INSTRUCTIONS BEFORE COMPLETING THIS REPORT.

Section X. Generator's Identification Number

Enter your EPA identification number.

Example:



X. GENERATOR'S EPA I.D. NO.

G N J D 7 8 4 6 2 1 3 8 3 1

Section XI. Facility's Identification Number

Enter the EPA identification number of the facility to which you sent the waste described below in Section XIV (a separate sheet must be used for each facility to which you sent hazardous waste.)

Section XII. Facility Name

Enter the name of the facility corresponding to the facility's EPA identification number in Section XI.

Section XIII. Facility Address

Enter the address of the facility corresponding to the facility's EPA identification number in Section XI.

Section XIV. Waste Identification

All information in this section must be entered by line number. Each line entry will describe the total annual amount of each waste shipped to the facility identified in Section XI, above.

Section XIV-A. Description of Waste

For hazardous wastes that are listed under 40 CFR Part 261, Subpart D, enter the EPA listed name, abbreviated if necessary. Where mixtures of listed wastes were shipped, enter the description which you believe best describes the waste.

For unlisted hazardous waste identified under 40 CFR Part 261, Subpart C, enter the description which you believe best describes the waste. Include the specific manufacturing or other process generating the waste (e.g., green sludge from widget manufacturing) and, if known, the chemical or generic chemical name of the waste.

Section XIV-B. DOT Hazard Class

Enter the two digit code from Table 1 which corresponds to the DOT hazard class of the waste described. (If the waste described has been shipped under more than one DOT hazard class, use a separate line for each DOT hazard class.)

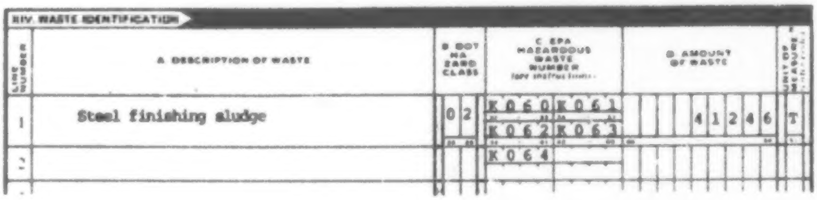
Table 1

DOT hazard class	Code
Combustible	01
Corrosive	02
Etiologic agent	03
Explosive A	04
Explosive B	05
Flammable gas	06
Flammable liquid	07
Flammable solid	08
Irritating agent	09
Nonflammable gas	10
Organic peroxide	11
ORM-E	12
Oxidizer	13
Poison A	14
Poison B	15
Radioactive	16

Section XIV-C. EPA Hazardous Waste Number

For listed wastes, enter the EPA Hazardous Waste Number from 40 CFR Part 261, Subpart D, which identifies the waste.

For a mixture of more than one listed waste, enter each of the applicable EPA Hazardous Waste Numbers. Four spaces are provided. If more space is needed, continue on the next line(s) and leave all other information on that line blank.



XIV. WASTE IDENTIFICATION

LINE NUMBER	A. DESCRIPTION OF WASTE	B. DOT HAZARD CLASS	C. EPA HAZARDOUS WASTE NUMBER (see instructions)	D. AMOUNT OF WASTE	E. UNIT OF MEASURE
1	Steel finishing sludge	0 2	K 0 6 0 K 0 6 1 K 0 6 2 K 0 6 3	4 1 2 4 6	T
2			K 0 6 4		

For unlisted hazardous wastes, enter the EPA Hazardous Waste Numbers from 40 CFR Part 261, Subparts C, applicable to the waste. If more than four spaces are required, follow the procedure described above.

Section XIV-D. Amount of Waste

Enter the amount of this waste you shipped to the facility identified in Section XI and include the weight of containers if left at the treatment, storage, or disposal facility.

Section XIV-E. Unit of Measure

Enter the unit of measure code for the quantity of waste described on this line. Units of measure which must be used in this report and the appropriate codes are:

Units of measure	Code
Pounds	P
Short tons (2,000 lbs)	T
Kilograms	K
Tonnes (1,000 kg)	M

Units of volume may not be used for reporting but must be converted into one of the above units of weight taking into account the appropriate density or specific gravity of the waste.

Section XV. Comments

This space may be used to explain or clarify any entry. If used, enter a cross reference to the appropriate Section number.

Note.—Since more than one page is required for each report, enter the page number of each sheet in the lower right corner as well as the total number of pages.

[FR Doc. 80-14665 Filed 5-16-80; 8:45 am]

BILLING CODE 6560-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 263

[FRL 1470-8]

Standards for Transporters of Hazardous Waste

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Resource Conservation and Recovery Act, as amended, seeks to promote the protection of human health and the environment and to conserve valuable material and energy resources. In order to accomplish this, the Act establishes a national program to improve solid waste management, including the control of hazardous waste, the promotion of resource conservation and recovery, and the establishment of environmentally sound solid waste disposal practices.

The Part 263 regulations published February 26, 1980 in the **Federal Register** and the amended version published today establish standards for transporters of hazardous waste. These amendments are administrative changes to the regulations. Areas of change include: clarification of the effective date and compliance date of the regulation, clarification of the recordkeeping retention time, and an additional telephone number(s) for reporting discharges.

DATES: Effective date: November 19, 1980. EPA will accept public comment on these regulations and amendments for administrative errors only (e.g., typographical errors, incorrect cross references) until July 18, 1980. No extension in the effective date will be made, however, as a result of such comments.

ADDRESSES: The official docket for this regulation is located in Room 2711, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C., and is available for viewing from 9:00 am to 4:00 pm, Monday through Friday, excluding holidays.

For information on implementation of these regulations, contact your EPA Regional Office.

FOR FURTHER INFORMATION CONTACT: For technical assistance on these regulations, contact Harry W. Trask or Carolyn Barley, Office of Solid Waste, (WH-563), U.S. Environmental Protection Agency, Washington, D.C. 20460 (202-755-9145). For single copies of the amended Part 263 preamble and regulations published today and for copies of the February 26, 1980 version which contains a more descriptive preamble of this whole Part, contact Edward Cox, Solid Waste Publications, 26 West Saint Claire, Cincinnati, Ohio 45268 (513/684-5362). Multiple copies will be available from the Superintendent of Documents, Washington, D.C. 20402.

SUPPLEMENTARY INFORMATION:

I. Authority

These amendments are issued under authority of Sections 2002(a), 3001, 3002, 3003, 3004 and 3005 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and as amended by the Quiet Communities Act of 1978 ("RCRA" or "the Act"), 42 U.S.C. 6912(a), 6921, 6922, 6923, 6924, 6925.

II. Background

This regulation was published in the **Federal Register** in proposed form for public review and comment on April 28, 1978 as 40 CFR Part 250, Subpart C (43 FR 18506 *et seq.*). The Agency held six public hearings, one of which was a joint hearing with the Department of Transportation (DOT) and received a substantial number of written comments on the proposal. The public comment period closed on March 16, 1979.

After consideration of the views of the public, the Agency promulgated the Part 263 regulations in the **Federal Register** February 26, 1980 and promulgates this amended version today.

These amendments are administrative amendments and are corrections or clarifications to the intent of Part 263 preamble and regulations.

III. Amendments

1. Effective Date

RCRA establishes the effective date of Subtitle C regulations as "the date six months after the date of promulgation thereof . . ." (Section 3010(b)). Regulations implementing Section 3001 (40 CFR Part 261) identify characteristics of hazardous waste and list particular wastes as hazardous. These regulations are essential in determining who must comply with the Subtitle C regulations. Therefore, EPA intends to make the effective date of regulations implementing Sections 3002 and 3003 six months from the date of promulgation of Part 261. Since Part 261 is promulgated today, the effective date is November 19, 1980.

Some confusion developed when in the **Federal Register** EPA stipulated that the "effective date" was August 26, 1980 and that the "compliance date" was six months after the promulgation of 40 CFR Part 261. For determining the date at which transporters will be subject to these regulations, the August 26, 1980 date is incorrect. All transporters must comply with these regulations as of November 19, 1980.

2. Recordkeeping

Section 263.22 (b) and (c) which appeared in the February 26, 1980 **Federal Register** did not specify the length of time the transporter was required to retain a copy of the manifest or shipping paper. These amendments clarify this requirement by requiring records to be kept for three years from the date the manifest was accepted by the initial transporter. This time period is consistent with the other manifest recordkeeping requirements.

3. Discharge Reporting

The regulations which appeared in the February 26, 1980 **Federal Register** concerning immediate action for discharges did not include a telephone number(s) for reporting discharges which occur outside the toll free calling area. Therefore, Section 263.30(c)(1) is amended to include a toll call telephone number for transporters to use when reporting discharges which occur outside the continental United States. DOT will also amend 49 CFR 171.15 to require carriers (transporters) to use this toll number when applicable.

Section 263.30(d) limited water (bulk shipment) transporters to telephone reporting of discharges to either a toll free number or a District of Columbia number. Since it is not always practicable for water transporters (bulk shipment) to report discharges using these two numbers, EPA is amending this section to reference the Coast Guard's broader telephone reporting requirements found in 33 CFR 153.203.

4. State Programs

The preamble to the February 26, 1980 regulation did not discuss the effect of EPA authorization of State programs on the applicability of these regulations. This Part applies in States which have not received interim or final authorization to operate the hazardous waste management system in lieu of the Federal program. With one exception, the provisions of these regulations do not apply in States which have been authorized under the provisions of 40 CFR Part 123. Section 40 CFR 123.128(d) enables States to obtain interim authorization while allowing EPA to administer and enforce the Federal manifest system as established in 40 CFR Parts 262 and 263.

IV. OMB Review

The preamble to the February 26, 1980 regulations indicated that OMB had not completed its review of the recordkeeping and reporting provisions of the Section 3002, 3003 and 3010 standards. OMB has now completed its review and has approved all of those provisions. EPA has developed an evaluation plan for the entire hazardous waste regulatory program. The plan commits EPA to an evaluation of each of those provisions and to modifying them, if necessary, based on the practical experience gained during implementation.

Dated: May 8, 1980.

Douglas M. Costle,

Administrator.

Title 40 CFR Part 263 is revised to read as follows:

PART 263—STANDARDS APPLICABLE TO TRANSPORTERS OF HAZARDOUS WASTE

Subpart A—General

Sec.
263.10 Scope.
263.11 EPA Identification Numbers.

Subpart B—Compliance With the Manifest System and Recordkeeping

263.20 The Manifest System.
263.21 Compliance with the Manifest.
263.22 Recordkeeping.

Subpart C—Hazardous Waste Discharges

263.30 Immediate Action.
263.31 Discharge Clean Up.

Authority: Sec. 2002(a), 3002, 3003, 3004 and 3005 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 and as amended by the Quiet Communities Act of 1978, (42 U.S.C. 6912, 6922, 6923, 6924, 6925).

Subpart A—General

§ 263.10 Scope.

(a) These regulations establish standards which apply to persons transporting hazardous waste within the United States if the transportation requires a manifest under 40 CFR Part 262.

Note.—The regulations set forth in Parts 262 and 263 establish the responsibilities of generators and transporters of hazardous waste in the handling, transportation, and management of that waste. In these regulations, EPA has expressly adopted certain regulations of the Department of Transportation (DOT) governing the transportation of hazardous materials. These regulations concern, among other things, labeling, marking, placarding, using proper containers, and reporting discharges. EPA has expressly adopted these regulations in order to satisfy its statutory obligation to promulgate regulations which are necessary to protect human health and the environment in the transportation of hazardous waste. EPA's adoption of these DOT regulations ensures consistency with the requirements of DOT and thus avoids the establishment of duplicative or conflicting requirements with respect to these matters. These EPA regulations which apply to both interstate and intrastate transportation of hazardous waste are enforceable by EPA.

DOT has revised its hazardous materials transportation regulations in order to encompass the transportation of hazardous waste and to regulate intrastate, as well as interstate, transportation of hazardous waste. Transporters of hazardous waste are cautioned that DOT's regulations are fully applicable to their activities and enforceable by DOT. These DOT regulations are codified in Title 49, Code of Federal Regulations, Subchapter C.

EPA and DOT worked together to develop standards for transporters of hazardous waste in order to avoid conflicting requirements. Except for transporters of bulk shipments of hazardous waste by water, a transporter who meets all applicable requirements of 49 CFR Parts 171 through 179 and the requirements of 40 CFR sections 263.11 and 263.31 will be deemed in compliance with this Part. Regardless of DOT's action, EPA retains its authority to enforce these regulations.

(b) These regulations do not apply to on-site transportation of hazardous waste by generators or by owners or operators of permitted hazardous waste management facilities.

(c) A transporter of hazardous waste must also comply with 40 CFR Part 262, Standards Applicable to Generators of Hazardous Waste, if he:

(1) Transports hazardous waste into the United States from abroad; or

(2) Mixes hazardous wastes of different DOT shipping descriptions by placing them into a single container.

Note.—Transporters who store hazardous waste are required to comply with the storage standards in 40 CFR Parts 264 and 265 and the permit requirements of 40 CFR Part 122.

§ 263.11 EPA identification number.

(a) A transporter must not transport hazardous wastes without having received an EPA identification number from the Administrator.

(b) A transporter who has not received an EPA identification number may obtain one by applying to the Administrator using EPA Form 8700–12. Upon receiving the request, the Administrator will assign an EPA identification number to the transporter.

Subpart B—Compliance With the Manifest System and Recordkeeping

§ 263.20 The manifest system.

(a) A transporter may not accept hazardous waste from a generator unless it is accompanied by a manifest, signed by the generator in accordance with the provisions of 40 CFR Part 262.

(b) Before transporting the hazardous waste, the transporter must sign and date the manifest acknowledging acceptance of the hazardous waste from the generator. The transporter must return a signed copy to the generator before leaving the generator's property.

(c) The transporter must ensure that the manifest accompanies the hazardous waste.

(d) A transporter who delivers a hazardous waste to another transporter or to the designated facility must:

(1) Obtain the date of delivery and the handwritten signature of that transporter or of the owner or operator of the designated facility on the manifest; and

(2) Retain one copy of the manifest in accordance with § 263.22; and

(3) give the remaining copies of the manifest to the accepting transporter or designated facility.

(e) The requirements of paragraphs (c) and (d) of this section do not apply to rail or water (bulk shipment) transporters if:

(1) The hazardous waste is delivered by rail or water (bulk shipment) to the designated facility; and

(2) A shipping paper containing all the information required on the manifest (excluding the EPA identification numbers, generator certification, and signatures) accompanies the hazardous waste; and

(3) The delivering transporter obtains the date of delivery and handwritten signature of the owner or operator of the designated facility on either the manifest or the shipping paper; and

(4) The person delivering the hazardous waste to the initial rail or water (bulk shipment) transporter obtains the date of delivery and signature of the rail or water (bulk shipment) transporter on the manifest and forwards it to the designated facility; and

(5) A copy of the shipping paper or manifest is retained by each rail or water (bulk shipment) transporter in accordance with § 263.22.

(f) Transporters who transport hazardous waste out of the United States must:

(1) indicate on the manifest the date the hazardous waste left the United States; and

(2) sign the manifest and retain one copy in accordance with § 263.22(c); and

(3) return a signed copy of the manifest to the generator.

§ 263.21 Compliance with the manifest.

(a) The transporter must deliver the entire quantity of hazardous waste which he has accepted from a generator or a transporter to:

(1) The designated facility listed on the manifest; or

(2) The alternate designated facility, if the hazardous waste cannot be delivered to the designated facility because an emergency prevents delivery; or

(3) The next designated transporter; or

(4) The place outside the United States designated by the generator.

(b) If the hazardous waste cannot be delivered in accordance with paragraph (a) of this section, the transporter must contact the generator for further directions and must revise the manifest according to the generator's instructions.

§ 263.22 Recordkeeping.

(a) A transporter of hazardous waste must keep a copy of the manifest signed by the generator, himself, and the next designated transporter or the owner or operator of the designated facility for a period of three years from the date the hazardous waste was accepted by the initial transporter.

(b) For shipments delivered to the designated facility by rail or water (bulk shipment), each rail or water (bulk shipment) transporter must retain a copy of a shipping paper containing all the information required in § 263.20(e)(2) for a period of three years from the date the hazardous waste was accepted by the initial transporter.

(c) A transporter who transports hazardous waste out of the United States must keep a copy of the manifest indicating that the hazardous waste left the United States for a period of three years from the date the hazardous waste was accepted by the initial transporter.

(d) The periods of retention referred to in this Section are extended automatically during the course of any unresolved enforcement action regarding the regulated activity or as requested by the Administrator.

Subpart C—Hazardous Waste Discharges

§ 263.30 Immediate action.

(a) In the event of a discharge of hazardous waste during transportation, the transporter must take appropriate immediate action to protect human health and the environment (e.g., notify local authorities, dike the discharge area).

(b) If a discharge of hazardous waste occurs during transportation and an official (State or local government or a Federal Agency) acting within the scope of his official responsibilities determines that immediate removal of the waste is necessary to protect human health or the environment, that official may authorize the removal of the waste by transporters who do not have EPA identification numbers and without the preparation of a manifest.

(c) An air, rail, highway, or water transporter who has discharged hazardous waste must:

(1) Give notice, if required by 49 CFR 171.15, to the National Response Center (800-424-8802 or 202-426-2675); and

(2) Report in writing as required by 49 CFR 171.16 to the Director, Office of Hazardous Materials Regulations, Materials Transportation Bureau, Department of Transportation, Washington, D.C. 20590.

(d) A water (bulk shipment) transporter who has discharged hazardous waste must give the same notice as required by 33 CFR 153.203 for oil and hazardous substances.

§ 263.31 Discharge clean up.

A transporter must clean up any hazardous waste discharge that occurs during transportation or take such action as may be required or approved by Federal, State, or local officials so that the hazardous waste discharge no longer presents a hazard to human health or the environment.

[FR Doc. 80-14[illegible] Filed 5-16-80; 8:45 am]

BILLING CODE 6560-01-M

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

Subpart A—General

Sec.
264.1 Purpose, scope and applicability.
264.2 [Reserved]
264.3 Relationship to interim status standards.
264.4 Imminent hazard action.
264.5–264.9 [Reserved]

Subpart B—General Facility Standards

264.10 Applicability.
264.11 Identification number.
264.12 Required notices.
264.13 General waste analysis.
264.14 Security.
264.15 General inspection requirements.
264.16 Personnel training.
264.17–264.29 [Reserved]

Subpart C—Preparedness and Prevention

264.30 Applicability.
264.31 Design and operation of facility.
264.32 Required equipment.
264.33 Testing and maintenance of equipment.
264.34 Access to communications or alarm system.
264.35 Required aisle space.
264.36 Special handling for ignitable or reactive waste.
264.37 Arrangements with local authorities.
264.38–264.49 [Reserved]

Subpart D—Contingency Plan and Emergency Procedures

264.50 Applicability.

Sec.
264.51 Purpose and implementation of contingency plan.
264.52 Content of contingency plan.
264.53 Copies of contingency plan.
264.54 Amendment of contingency plan.
264.55 Emergency coordinator.
264.56 Emergency procedures.
264.57–264.69 [Reserved]

Subpart E—Manifest System, Recordkeeping, and Reporting

264.70 Applicability.
264.71 Use of manifest system.
264.72 Manifest discrepancies
264.73 Operating record.
264.74 Availability, retention, and disposition of records.
264.75 Annual report.
264.76 Unmanifested waste report.
264.77 Additional reports.
264.78–264.999 [Reserved]
Appendix I—Recordkeeping instructions.
Appendix II—EPA report form and instructions.

Authority: Secs. 1006, 2002(a), and 3004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), and 6924).

Subpart A—General

§ 264.1 Purpose, scope and applicability.

(a) The purpose of this Part is to establish minimum national standards which define the acceptable management of hazardous waste.

(b) The standards in this Part apply to owners and operators of all facilities which treat, store, or dispose of hazardous waste, except as specifically provided otherwise in this Part or Part 261 of this Chapter.

(c) The requirements of this Part apply to a person disposing of hazardous waste by means of ocean disposal subject to a permit issued under the Marine Protection, Research, and Sanctuaries Act only to the extent they are included in a RCRA permit by rule granted to such a person under Part 122 of this Chapter.

[*Comment:* These Part 264 regulations do apply to the treatment or storage of hazardous waste before it is loaded onto an ocean vessel for incineration or disposal at sea.]

(d) The requirements of this Part apply to a person disposing of hazardous waste by means of underground injection subject to a permit issued under an Underground Injection Control (UIC) program approved or promulgated under the Safe Drinking Water Act only to the extent they are required by § 122.45 of this Chapter.

[*Comment:* These Part 264 regulations do apply to the above-ground treatment or storage of hazardous waste before it is injected underground.]

(e) The requirements of this Part apply to the owner or operator of a POTW which treats, stores, or disposes of hazardous waste only to the extent they are included in a RCRA permit by rule granted to such a person under Part 122 of this Chapter.

(f) The requirements of this Part do not apply to a person who treats, stores, or disposes of hazardous waste in a State with a RCRA hazardous waste program authorized under Subparts A and B of Part 123 of this Chapter or with a RCRA Phase II hazardous waste program authorized under Subpart F of Part 123 of this Chapter, except that the requirements of this Part will continue to apply as stated in paragraph (d) of this Section, if the authorized State RCRA program does not cover disposal of hazardous waste by means of underground injection.

(g) The requirements of this Part do not apply to:

(1) The owner or operator of a facility permitted, licensed, or registered by a State to manage municipal or industrial solid waste, if the only hazardous waste the facility treats, stores, or disposes of is excluded from regulation under this Part by § 261.5 of this Chapter;

(2) The owner or operator of a facility which treats or stores hazardous waste, which treatment or storage meets the criteria in § 261.6(a) of this Chapter, except to the extent that § 261.6(b) of this Chapter provides otherwise;

(3) A generator accumulating waste on-site in compliance with § 262.34 of this Chapter;

(4) A farmer disposing of waste pesticides from his own use in compliance with § 262.51 of this Chapter; or

(5) The owner or operator of a totally enclosed treatment facility, as defined in § 260.10.

§ 264.2 [Reserved]

§ 264.3 Relationship to interim status standards.

A facility owner or operator who has fully complied with the requirements for interim status—as defined in Section 3005(e) of RCRA and regulations under § 122.23 of this Chapter—must comply with the regulations specified in Part 265 of this Chapter in lieu of the regulations in this Part, until final administrative disposition of his permit application is made.

[*Comment:* As stated in Section 3005(a) of RCRA, after the effective date of regulations under that Section, i.e., Parts 122 and 124 of this Chapter, the treatment, storage, or disposal of hazardous waste is prohibited except in accordance with a permit. Section

3005(e) of RCRA provides for the continued operation of an existing facility which meets certain conditions until final administrative disposition of the owner's or operator's permit application is made.]

§ 264.4 Imminent hazard action.

Notwithstanding any other provisions of these regulations, enforcement actions may be brought purusant to Section 7003 of RCRA.

§§ 264.5–264.9 [Reserved]

Subpart B—General Facility Standards

§ 264.10 Applicability.

The regulations in this Subpart apply to owners and operators of all hazardous waste facilities, except as § 264.1 provides otherwise.

§ 264.11 Identification number.

Every facility owner or operator must apply to EPA for an EPA identification number in accordance with the EPA notification procedures (45 FR 12746).

§ 264.12 Required notices.

(a) The owner or operator of a facility that has arranged to receive hazardous waste from a foreign source must notify the Regional Administrator in writing at least four weeks in advance of the date the waste is expected to arrive at the facility. Notice of subsequent shipments of the same waste from the same foreign source is not required.

(b) The owner or operator of a facility that receives hazardous waste from an off-site source (except where the owner or operator is also the generator) must inform the generator in writing that he has the appropriate permit(s) for, and will accept, the waste the generator is shipping. The owner or operator must keep a copy of this written notice as part of the operating record.

(c) Before transferring ownership or operation of a facility during its operating life, or of a disposal facility during the post-closure care period, the owner or operator must notify the new owner or operator in writing of the requirements of this Part and Part 122 of this Chapter.

[*Comment:* An owner's or operator's failure to notify the new owner or operator of the requirements of this Part in no way relieves the new owner or operator of his obligation to comply with all applicable requirements.]

§ 264.13 General waste analysis.

(a) (1) Before an owner or operator treats, stores, or disposes of any hazardous waste, he must obtain a detailed chemical and physical analysis of a representative sample of the waste. At a minimum, this analysis must contain all the information which must be known to treat, store, or dispose of the waste in accordance with the requirements of this Part or with the conditions of a permit issued under Part 122, Subparts A and B, and Part 124 of this Chapter.

(2) The analysis may include data developed under Part 261 of this Chapter, and existing published or documented data on the hazardous waste or on hazardous waste generated from similar processes.

[*Comment:* For example, the facility's records of analyses performed on the waste before the effective date of these regulations, or studies conducted on hazardous waste generated from processes similar to that which generated the waste to be managed at the facility, may be included in the data base required to comply with paragraph (a)(1) of this Section. The owner or operator of an off-site facility may arrange for the generator of the hazardous waste to supply part or all of the information required by paragraph (a)(1) of this Section. If the generator does not supply the information, and the owner or operator chooses to accept a hazardous waste, the owner or operator is responsible for obtaining the information required to comply with this Section.]

(3) The analysis must be repeated as necessary to ensure that it is accurate and up to date. At a minimum, the analysis must be repeated:

(i) When the owner or operator is notified, or has reason to believe, that the process or operation generating the hazardous waste has changed; and

(ii) For off-site facilities, when the results of the inspection required in paragraph (a)(4) of this Section indicate that the hazardous waste received at the facility does not match the waste designated on the accompanying manifest or shipping paper.

(4) The owner or operator of an off-site facility must inspect and, if necessary, analyze each hazardous waste movement received at the facility to determine whether it matches the identity of the waste specified on the accompanying manifest or shipping paper.

(b) The owner or operator must develop and follow a written waste analysis plan which describes the procedures which he will carry out to comply with paragraph (a) of this Section. He must keep this plan at the facility. At a minimum, the plan must specify:

(1) The parameters for which each hazardous waste will be analyzed and the rationale for the selection of these parameters (i.e., how analysis for these parameters will provide sufficient information on the waste's properties to comply with paragraph (a) of this Section);

(2) The test methods which will be used to test for these parameters;

(3) The sampling method which will be used to obtain a representative sample of the waste to be analyzed. A representative sample may be obtained using either:

(i) One of the sampling methods described in Appendix I of Part 261 of this Chapter; or

(ii) An equivalent sampling method.

[*Comment:* See § 261.20(c) of this Chapter for related discussion.]

(4) The frequency with which the initial analysis of the waste will be reviewed or repeated to ensure that the analysis is accurate and up to date; and

(5) For off-site facilities, the waste analyses that hazardous waste generators have agreed to supply.

(c) For off-site facilities, the waste analysis plan required in paragraph (b) of this Section must also specify the procedures which will be used to inspect and, if necessary, analyze each movement of hazardous waste received at the facility to ensure that it matches the identity of the waste designated on the accompanying manifest or shipping paper. At a minimum, the plan must describe:

(1) The procedures which will be used to determine the identity of each movement of waste managed at the facility; and

(2) The sampling method which will be used to obtain a representative sample of the waste to be identified, if the identification method includes sampling.

[*Comment:* Part 122, Subpart B, of this Chapter requires that the waste analysis plan be submitted with Part B of the permit application.]

§ 264.14 Security.

(a) The owner or operator must prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of his facility, *unless* he can demonstrate to the Regional Administrator that:

(1) Physical contact with the waste, structures, or equipment within the active portion of the facility will not injure unknowing or unauthorized persons or livestock which may enter the active portion of a facility; and

(2) Disturbance of the waste or equipment, by the unknowing or unauthorized entry of persons or

livestock onto the active portion of a facility, will not cause a violation of the requirements of this Part.

[*Comment:* Part 122, Subpart B, of this Chapter requires that an owner or operator who wishes to make the demonstration referred to above must do so with Part B of the permit application.]

(b) Unless the owner or operator has made a successful demonstration under paragraphs (a)(1) and (a)(2) of this Section, a facility must have:

(1) A 24-hour surveillance system (e.g., television monitoring or surveillance by guards or facility personnel) which continuously monitors and controls entry onto the active portion of the facility; or

(2) (i) An artificial or natural barrier (e.g., a fence in good repair or a fence combined with a cliff), which completely surrounds the active portion of the facility; and

(ii) A means to control entry, at all times, through the gates or other entrances to the active portion of the facility (e.g., an attendant, television monitors, locked entrance, or controlled roadway access to the facility).

[*Comment:* The requirements of paragraph (b) of this Section are satisfied if the facility or plant within which the active portion is located itself has a surveillance system, or a barrier and a means to control entry, which complies with the requirements of paragraph (b)(1) or (b)(2) of this Section.]

(c) Unless the owner or operator has made a successful demonstration under paragraphs (a)(1) and (a)(2) of this Section, a sign with the legend, "Danger—Unauthorized Personnel Keep Out", must be posted at each entrance to the active portion of a facility, and at other locations, in sufficient numbers to be seen from any approach to this active portion. The legend must be written in English and in any other language predominant in the area surrounding the facility (e.g., facilities in counties bordering the Canadian province of Quebec must post signs in French; facilities in counties bordering Mexico must post signs in Spanish), and must be legible from a distance of at least 25 feet. Existing signs with a legend other than "Danger—Unauthorized Personnel Keep Out" may be used if the legend on the sign indicates that only authorized personnel are allowed to enter the active portion, and that entry onto the active portion can be dangerous.

§ 264.15 General inspection requirements.

(a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing—or may lead to—(1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

(b)(1) The owner or operator must develop and follow a written schedule for inspecting monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of possible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction or any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use.

[*Comment:* Part 122, Subpart B, of this Chapter requires the inspection schedule to be submitted with Part B of the permit application. EPA will evaluate the schedule along with the rest of the application to ensure that it adequately protects human health and the environment. As part of this review, EPA may modify or amend the schedule as may be necessary.]

(c) The owner or operator must remedy any deterioration or malfunction of equipment or structures which the inspection reveals on a schedule which ensures that the problem does not lead to an environmental or human health hazard. Where a hazard is imminent or has already occurred, remedial action must be taken immediately.

(d) The owner or operator must record inspections in an inspection log or summary. He must keep these records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector, a notation of the observations made, and the date and nature of any repairs or other remedial actions.

§ 264.16 Personnel training.

(a)(1) Facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with the requirements of this Part. The owner or operator must ensure that this program includes all the elements described in the document required under paragraph (d)(3) of this Section.

(2) This program must be directed by a person trained in hazardous waste management procedures, and must include instruction which teaches facility personnel hazardous waste management procedures (including contingency plan implementation) relevant to the positions in which they are employed.

(3) At a minimum, the training program must be designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment, and emergency systems, including, where applicable:

(i) Procedures for using, inspecting, repairing, and replacing facility emergency and monitoring equipment;

(ii) Key parameters for automatic waste feed cut-off systems;

(iii) Communications or alarm systems;

(iv) Response to fires or explosions;

(v) Response to ground-water contamination incidents; and

(vi) Shutdown of operations.

(b) Facility personnel must successfully complete the program required in paragraph (a) of this Section within six months after the effective date of these regulations or six months after the date of their employment or assignment to a facility, or to a new position at a facility, whichever is later. Employees hired after the effective date of these regulations must not work in unsupervised positions until they have completed the training requirements of paragraph (a) of this Section.

(c) Facility personnel must take part in an annual review of the initial training required in paragraph (a) of this Section.

(d) The owner or operator must maintain the following documents and records at the facility:

(1) The job title for each position at the facility related to hazardous waste management, and the name of the employee filling each job;

(2) A written job description for each position listed under paragraph (d)(1) of this Section. This description may be consistent in its degree of specificity with descriptions for other similar

positions in the same company location or bargaining unit, but must include the requisite skill, education, or other qualifications, and duties of employees assigned to each position; (3) A written description of the type and amount of both introductory and continuing training that will be given to each person filling a position listed under paragraph (d)(1) of this Section;

(4) Records that document that the training or job experience required under paragraphs (a), (b), and (c) of this Section has been given to, and completed by, facility personnel.

(e) Training records on current personnel must be kept until closure of the facility; training records on former employees must be kept for at least three years from the date the employee last worked at the facility. Personnel training records may accompany personnel transferred within the same company.

§§ 264.17—264.29 [Reserved]

Subpart C—Preparedness and Prevention

§ 264.30 Applicability.

The regulations in this Subpart apply to owners and operators of all hazardous waste facilities, except as § 264.1 provides otherwise.

§ 264.31 Design and operation of facility.

Facilities must be designed, constructed, maintained, and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.

§ 264.32 Required equipment.

All facilities must be equipped with the following, *unless* it can be demonstrated to the Regional Administrator that none of the hazards posed by waste handled at the facility could require a particular kind of equipment specified below:

(a) An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel;

(b) A device, such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or State or local emergency response teams;

(c) Portable fire extinguishers, fire control equipment (including special extinguishing equipment, such as that using foam, inert gas, or dry chemicals), spill control equipment, and decontamination equipment; and

(d) Water at adequate volume and pressure to supply water hose streams, or foam producing equipment, or automatic sprinklers, or water spray systems.

[*Comment:* Part 122, Subpart B, of this Chapter requires that an owner or operator who wishes to make the demonstration referred to above must do so with Part B of the permit application.]

§ 264.33 Testing and maintenance of equipment.

All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency.

§ 264.34 Access to communications or alarm system.

(a) Whenever hazardous waste is being poured, mixed, spread, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, *unless* the Regional Administrator has ruled that such a device is not required under § 264.32.

(b) If there is ever just one employee on the premises while the facility is operating, he must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance, *unless* the Regional Administrator has ruled that such a device is not required under § 264.32.

§ 264.35 Required aisle space.

The owner or operator must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency, *unless* it can be demonstrated to the Regional Administrator that aisle space is not needed for any of these purposes.

[*Comment:* Part 122, Subpart B, of this Chapter requires that an owner or operator who wishes to make the demonstration referred to above must do so with Part B of the permit application.]

§ 264.36 Special handling for ignitable or reactive waste.

The owner or operator must take precautions to prevent accidental ignition or reaction of ignitable or reactive waste. This waste must be separated and protected from sources of ignition or reaction including but not limited to: open flames, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical, or mechanical), spontaneous ignition (e.g., from heat-producing chemical reactions), and radiant heat. While ignitable or reactive waste is being handled, the owner or operator must confine smoking and open flame to specially designated locations. "No Smoking" signs must be conspicuously placed wherever there is a hazard from ignitable or reactive waste.

§ 264.37 Arrangements with local authorities.

(a) The owner or operator must attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and the potential need for the services of these organizations:

(1) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to and roads inside the facility, and possible evacuation routes;

(2) Where more than one police and fire department might respond to an emergency, agreements designating primary emergency authority to a specific police and a specific fire department, and agreements with any others to provide support to the primary emergency authority;

(3) Agreements with State emergency response teams, emergency response contractors, and equipment suppliers; and

(4) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility, and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility.

(b) Where State or local authorities decline to enter into such arrangements, the owner or operator must document the refusal in the operating record.

§§ 264.38—264.49 [Reserved]

Subpart D—Contingency Plan and Emergency Procedures

§ 264.50 Applicability.

The regulations in this Subpart apply to owners and operators of all hazardous waste facilities, except as § 264.1 provides otherwise.

§ 264.51 Purpose and implementation of contingency plan.

(a) Each owner or operator must have a contingency plan for his facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water.

(b) The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

§ 264.52 Content of contingency plan.

(a) The contingency plan must describe the actions facility personnel must take to comply with §§ 264.51 and 264.56 in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility.

(b) If the owner or operator has already prepared a Spill Prevention, Control, and Countermeasures (SPCC) Plan in accordance with Part 112 or Part 151 of this Chapter, or some other emergency or contingency plan, he need only amend that plan to incorporate hazardous waste management provisions that are sufficient to comply with the requirements of this Part.

(c) The plan must describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services, pursuant to § 264.37.

(d) The plan must list names, addresses, and phone numbers (office and home) of all persons qualified to act as emergency coordinator (see § 264.55), and this list must be kept up to date. Where more than one person is listed, one must be named as primary emergency coordinator and others must be listed in the order in which they will assume responsibility as alternates. *For new facilities,* this information must be supplied to the Regional Administrator at the time of certification, rather than at the time of permit application.

(e) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list, and a brief outline of its capabilities.

(f) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by releases of hazardous waste or fires).

§ 264.53 Copies of contingency plan.

A copy of the contingency plan and all revisions to the plan must be:

(a) Maintained at the facility; and

(b) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services.

[*Comment:* The contingency plan must be submitted to the Regional Administrator with Part B of the permit application under Part 122, Subparts A and B, of this Chapter and, after modification or approval, will become a condition of any permit issued.]

§ 264.54 Amendment of contingency plan.

The contingency plan must be reviewed, and immediately amended, if necessary, whenever:

(a) The facility permit is revised;

(b) The plan fails in an emergency;

(c) The facility changes—in its design, construction, operation, maintenance, or other circumstances—in a way that materially increases the potential for fires, explosions, or releases of hazardous waste or hazardous waste constituents, or changes the response necessary in an emergency;

(d) The list of emergency coordinators changes; or

(e) The list of emergency equipment changes.

[*Comment:* A change in the lists of facility emergency coordinators or equipment in the contingency plan constitutes a minor modification to the facility permit to which the plan is a condition.]

§ 264.55 Emergency coordinator.

At all times, there must be at least one employee either on the facility premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristics of waste handled, the location of all records within the facility, and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan.

[*Comment:* The emergency coordinator's responsibilities are more fully spelled out in § 264.56. Applicable responsibilities for the emergency coordinator vary, depending on factors such as type and variety of waste(s) handled by the facility, and type and complexity of the facility.]

§ 264.56 Emergency Procedures.

(a) Whenever there is an imminent or actual emergency situation, the emergency coordinator (or his designee when the emergency coordinator is on call) must immediately:

(1) Activate internal facility alarms or communication systems, where applicable, to notify all facility personnel; and

(2) Notify appropriate State or local agencies with designated response roles if their help is needed.

(b) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and areal extent of any released materials. He may do this by observation or review of facility records or manifests, and, if necessary, by chemical analysis.

(c) Concurrently, the emergency coordinator must assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment must consider both direct and indirect effects of the release, fire, or explosion (e.g., the effects of any toxic, irritating, or asphyxiating gases that are generated, or the effects of any hazardous surface water run-off from water or chemical agents used to control fire and heat-induced explosions).

(d) If the emergency coordinator determines that the facility has had a release, fire, or explosion which could threaten human health, or the environment, outside the facility, he must report his findings as follows:

(1) If his assessment indicates that evacuation of local areas may be advisable, he must immediately notify appropriate local authorities. He must be available to help appropriate officials decide whether local areas should be evacuated; and

(2) He must immediately notify either the government official designated as the on-scene coordinator for that geographical area, (in the applicable regional contingency plan under Part 1510 of this Title) or the National

Response Center (using their 24-hour toll free number 800/424-8802). The report must include:

(i) Name and telephone number of reporter.

(ii) Name and address of facility;

(iii) Time and type of incident (e.g., release, fire);

(iv) Name and quantity of material(s) involved, to the extent known;

(v) The extent of injuries, if any; and

(vi) The possible hazards to human health, or the environment, outside the facility.

(e) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other hazardous waste at the facility. These measures must include, where applicable, stopping processes and operations, collecting and containing release waste, and removing or isolating containers.

(f) If the facility stops operations in response to a fire, explosion, or release, the emergency coordinator must monitor for leaks, pressure buildup, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(g) Immediately after an emergency, the emergency coordinator must provide for treating, storing, or disposing of recovered waste, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility.

[*Comment:* Unless the owner or operator can demonstrate, in accordance with § 261.3(c) or (d) of this Chapter, that the recovered material is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 264 of this Chapter.]

(h) The emergency coordinator must ensure that, in the affected area(s) of the facility:

(1) No waste that may be incompatible with the released material is treated, stored, or disposed of until cleanup procedures are completed; and

(2) All emergency equipment listed in the contingency plan is cleaned and fit for its intended use before operations are resumed.

(i) The owner or operator must notify the Regional Administrator, and appropriate State and local authorities, that the facility is in compliance with paragraph (h) of this Section before operations are resumed in the affected area(s) of the facility.

(j) The owner or operator must note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, he must submit a written report on the incident to the Regional Administrator. The report must include:

(1) Name, address, and telephone number of the owner or operator;

(2) Name, address, and telephone number of the facility;

(3) Date, time, and type of incident (e.g., fire, explosion);

(4) Name and quantity of material(s) involved;

(5) The extent of injuries, if any;

(6) An assessment of actual or potential hazards to human health or the environment, where this is applicable; and

(7) Estimated quantity and disposition of recovered material that resulted from the incident.

§§ 264.57-264.69 [Reserved]

Subpart E—Manifest System, Recordkeeping, and Reporting

§ 264.70 Applicability.

The regulations in this Subpart apply to owners and operators of both on-site and off-site facilities, except as § 264.1 provides otherwise. Sections 264.71, 264.72, and 264.76 do not apply to owners and operators of on-site facilities that do not receive any hazardous waste from off-site sources.

§ 264.71 Use of manifest system.

(a) If a facility receives hazardous waste accompanied by a manifest, the owner or operator, or his agent, must:

(1) Sign and date each copy of the manifest to certify that the hazardous waste covered by the manifest was received;

(2) Note any significant discrepancies in the manifest (as defined in § 264.72(a)) on each copy of the manifest;

[*Comment:* The Agency does not intend that the owner or operator of a facility whose procedures under § 264.13(c) include waste analysis must perform that analysis before signing the manifest and giving it to the transporter. Section 264.72(b), however, requires reporting an unreconciled discrepancy discovered during later analysis.]

(3) Immediately give the transporter at least one copy of the signed manifest;

(4) Within 30 days after the delivery, send a copy of the manifest to the generator; and

(5) Retain at the facility a copy of each manifest for at least three years from the date of delivery.

(b) If a facility receives, from a rail or water (bulk shipment) transporter, hazardous waste which is accompanied by a shipping paper containing all the information required on the manifest (excluding the EPA identification numbers, generator's certification, and signatures), the owner or operator, or his agent, must:

(1) Sign and date each copy of the shipping paper to certify that the hazardous waste covered by the shipping paper was received;

(2) Note any significant discrepancies in the shipping paper (as defined in § 264.72(a)) on each copy of the shipping paper;

[*Comment:* The Agency does not intend that the owner or operator of a facility whose procedures under § 264.13(c) include waste analysis must perform that analysis before signing the shipping paper and giving it to the transporter. Section 264.72(b), however, requires reporting an unreconciled discrepancy discovered during later analysis.]

(3) Immediately give the rail or water (bulk shipment) transporter at least one copy of the shipping paper;

(4) Within 30 days after the delivery, send a copy of the shipping paper to the generator; however, if the manifest is received within 30 days after the delivery, the owner or operator, or his agent, must sign and date the manifest and return it to the generator in lieu of the shipping paper; and

[*Comment:* Section 262.23(c) of this chapter requires the generator to send three copies of the manifest to the facility when hazardous waste is sent by rail or water (bulk shipment).]

(5) Retain at the facility a copy of each shipping paper and manifest for at least three years from the date of delivery.

§ 264.72 Manifest discrepancies.

(a) Manifest discrepancies are differences between the quantity or type of hazardous waste designated on the manifest or shipping paper, and the quantity or type of hazardous waste a facility actually receives. Significant discrepancies in quantity are: (1) For bulk waste, variations greater than 10 percent in weight, and (2) for batch waste, any variation in piece count, such as a discrepancy of one drum in a truckload. Significant discrepancies in type are obvious differences which can be discovered by inspection or waste analysis, such as waste solvent substituted for waste acid, or toxic constituents not reported on the manifest or shipping paper.

(b) Upon discovering a significant discrepancy, the owner or operator must attempt to reconcile the discrepancy with the waste generator or transporter (e.g., with telephone conversations). If the discrepancy is not resolved within 15 days after receiving the waste, the owner or operator must immediately submit to the Regional Administrator a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest or shipping paper at issue.

§ 264.73 Operating record.

(a) The owner or operator must keep a written operating record at his facility.

(b) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:

(1) A description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or disposal at the facility as required by Appendix I;

(2) The location of each hazardous waste within the facility and the quantity at each location. For disposal facilities, the location and quantity of each hazardous waste must be recorded on a map or diagram of each cell or disposal area. For all facilities, this information must include cross-references to specific manifest document numbers, if the waste was accompanied by a manifest;

(3) Records and results of waste analyses performed as specified in § 264.13;

(4) Summary reports and details of all incidents that require implementing the contingency plan as specified in § 264.56(j);

(5) Records and results of inspections as required by § 264.15(d) (except these data need be kept only three years); and

(6) For off-site facilities, notices to generators as specified in § 264.12(b).

§ 264.74 Availability, retention, and disposition of records.

(a) All records, including plans, required under this Part must be furnished upon request, and made available at all reasonable times for inspection, by any officer, employee, or representative of EPA who is duly designated by the Administrator.

(b) The retention period for all records required under this Part is extended automatically during the course of any unresolved enforcement action regarding the facility or as requested by the Administrator.

(c) A copy of records of waste disposal locations and quantities under § 264.73(b)(2) must be submitted to the Regional Administrator and local land authority upon closure of the facility.

§ 264.75 Annual report.

The owner or operator must prepare and submit a single copy of an annual report to the Regional Administrator by March 1 of each year. The report form and instructions in Appendix II must be used for this report. The annual report must cover facility activities during the previous calendar year and must include the following information:

(a) The EPA identification number, name, and address of the facility;

(b) The calendar year covered by the report;

(c) For off-site facilities, the EPA identification number of each hazardous waste generator from which the facility received a hazardous waste during the year; for imported shipments, the report must give the name and address of the foreign generator;

(d) A description and the quantity of each hazardous waste the facility received during the year. For off-site facilities, this information must be listed by EPA identification number of each generator;

(e) The method of treatment, storage, or disposal for each hazardous waste; and

(f) The certification signed by the owner or operator of the facility or his authorized representative.

§ 264.76 Unmanifested waste report.

If a facility accepts for treatment, storage, or disposal any hazardous waste from an off-site source without an accompanying manifest, or without an accompanying shipping paper as described in § 263.20(e)(2) of this Chapter, and if the waste is not excluded from the manifest requirement by § 261.5 of this Chapter, then the owner or operator must prepare and submit a single copy of a report to the Regional Administrator within 15 days after receiving the waste. The report form and instructions in Appendix II must be used for this report. The report must include the following information:

(a) The EPA identification number, name, and address of the facility;

(b) The date the facility received the waste;

(c) The EPA identification number, name, and address of the generator and the transporter, if available;

(d) A description and the quantity of each unmanifested hazardous waste and facility received;

(e) The method of treatment, storage, or disposal for each hazardous waste;

(f) The certification signed by the owner or operator of the facility or his authorized representative; and

(g) A brief explanation of why the waste was unmanifested, if known.

[*Comment:* Small quantities of hazardous waste are excluded from regulation under this Part and do not require a manifest. Where a facility receives unmanifested hazardous wastes, the Agency suggests that the owner or operator obtain from each generator a certification that the waste qualifies for exclusion. Otherwise, the Agency suggests that the owner or operator file an unmanifested waste report for the hazardous waste movement.]

§ 264.77 Additional reports.

In addition to submitting the annual report and unmanifested waste reports described in §§ 264.75 and 264.76, the owner or operator must also report to the Regional Administrator releases, fires, and explosions as specified in § 264.56(j).

§§ 264.78–264.999 [Reserved].

Appendix I.— Recordkeeping Instructions

The recordkeeping provisions of § 264.73 specify that an owner or operator must keep a written operating record at his facility. This appendix provides additional instructions for keeping *portions* of the operating record. See § 264.73(b) for additional recordkeeping requirements.

The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility in the following manner:

Records of each hazardous waste received, treated, stored, or disposed of at the facility which include the following:

(1) A description by its common name and the EPA Hazardous Waste Number(s) from Part 261 of this Chapter which apply to the waste. The waste description also must include the waste's physical form, i.e., liquid, sludge, solid, or contained gas. If the waste is not listed in Part 261, Subpart D, of this Chapter, the description also must include the process that produced it (for example, solid filter cake from production of ——, EPA Hazardous Waste Number W051).

Each hazardous waste listed in Part 261, Subpart D, of this Chapter, and each hazardous waste characteristic defined in Part 261, Subpart C, of this Chapter, has a four-digit EPA Hazardous Waste Number assigned to it. This number must be used for recordkeeping and reporting purposes. Where a hazardous waste contains more than one listed hazardous waste, or where more than one hazardous waste characteristic applies to the waste, the waste description must include all applicable EPA Hazardous Waste Numbers.

(2) The estimated or manifest-reported weight, or volume and density, where applicable, in one of the units of measure specified in Table 1;

(3) The method(s) (by handling code(s) as specified in Table 2) and date(s) of treatment, storage, or disposal.

Table 1

Unit of measure	Symbol	¹Density
Pounds	P	
Short tons (2000 lbs)	T	
Gallons (U.S.)	G	P/G
Cubic yards	Y	T/Y
Kilograms	K	
Tonnes (1000 kg)	M	
Liters	L	K/L
Cubic meters	C	M/C

[1] Single digit symbols are used here for data processing purposes.

Table 2.—Handling Codes for Treatment, Storage, and Disposal Methods

Enter the handling code(s) listed below that most closely represents the technique(s) used at the facility to treat, store, or dispose of each quantity of hazardous waste received.

1. Storage
   - S01 Container (barrel, drum, etc.)
   - S02 Tank
   - S03 Waste pile
   - S04 Surface impoundment
   - S05 Other (specify)
2. Treatment
   - (a) Thermal Treatment
     - T06 Liquid injection incinerator
     - T07 Rotary kiln incinerator
     - T08 Fluidized bed incinerator
     - T09 Multiple hearth incinerator
     - T10 Infrared furnace incinerator
     - T11 Molten salt destructor
     - T12 Pyrolysis
     - T13 Wet Air oxidation
     - T14 Calcination
     - T15 Microwave discharge
     - T16 Cement kiln
     - T17 Lime kiln
     - T18 Other (specify)
   - (b) Chemical Treatment
     - T19 Absorption mound
     - T20 Absorption field
     - T21 Chemical fixation
     - T22 Chemical oxidation
     - T23 Chemical precipitation
     - T24 Chemical reduction
     - T25 Chlorination
     - T26 Chlorinolysis
     - T27 Cyanide destruction
     - T28 Degradation
     - T29 Detoxification
     - T30 Ion exchange
     - T31 Neutralization
     - T32 Ozonation
     - T33 Photolysis
     - T34 Other (specify)
   - (c) Physical Treatment
     - (1) Separation of components
       - T35 Centrifugation
       - T36 Clarification
       - T37 Coagulation
       - T38 Decanting
       - T39 Encapsulation
       - T40 Filtration
       - T41 Flocculation
       - T42 Flotation
       - T43 Foaming
       - T44 Sedimentation
       - T45 Thickening
       - T46 Ultrafiltration
       - T47 Other (specify)
     - (2) Removal of Specific Components
       - T48 Absorption-molecular sieve
       - T49 Activated carbon
       - T50 Blending
       - T51 Catalysis
       - T[illegible] [illegible]ystallization
       - T53 Dialysis
       - T54 Distillation
       - T55 Electrodialysis
       - T56 Electrolysis
       - T57 Evaporation
       - T58 High gradient magnetic separation
       - T59 Leaching
       - T60 Liquid ion exchange
       - T61 Liquid-liquid extraction
       - T62 Reverse osmosis
       - T63 Solvent recovery
       - T64 Stripping
       - T65 Sand filter
       - T66 Other (specify)
   - (d) Biological Treatment
     - T67 Activated sludge
     - T68 Aerobic lagoon
     - T69 Aerobic tank
     - T70 Anaerobic lagoon
     - T71 Composting
     - T72 Septic tank
     - T73 Spray irrigation
     - T74 Thickening filter
     - T75 Tricking filter
     - T76 Waste stabilization pond
     - T77 Other (specify)
     - T78–79 [Reserved]
3. Disposal
   - D80 Underground injection
   - D81 Landfill
   - D82 Land treatment
   - D83 Ocean disposal
   - D84 Surface impoundment (to be closed as a landfill)
   - D85 Other (specify)

Appendix II.—EPA Report Form and Instructions

BILLING CODE 6560-01-M

Please print or type with ELITE type *(12 characters per inch).*

GSA No. 12345-XX
Form Approved OMB No. 158 R00XX

EPA U.S. ENVIRONMENTAL PROTECTION AGENCY

HAZARDOUS WASTE REPORT

PLEASE PLACE LABEL IN THIS SPACE

I. TYPE OF HAZARDOUS WASTE REPORT

PART A: GENERATOR ANNUAL REPORT

THIS REPORT IS FOR THE YEAR ENDING DEC. 31, 19__

PART B: FACILITY ANNUAL REPORT

THIS REPORT FOR YEAR ENDING DEC. 31, 19__

PART C: UNMANIFESTED WASTE REPORT

THIS REPORT IS FOR A WASTE RECEIVED *(day, mo., & yr.)* __ - __ - 19__

INSTRUCTIONS. You may have received a preprinted label attached to the front of this pamphlet; affix it in the designated space above—left. If any of the information on the label is incorrect, draw a line through it and supply the correct information in the appropriate section below. If the label is complete and correct, leave Sections II, III, and IV below blank. If you did not receive a preprinted label, complete all sections. "Installation" means a single site where hazardous waste is generated, treated, stored, or disposed of. Please refer to the specific instructions for generators or facilities before completing this form. The information requested herein is required by law *(Section 3002/3004 of the Resource Conservation and Recovery Act).*

II. INSTALLATION'S EPA I.D. NUMBER

F ☐☐☐☐☐☐☐☐☐☐☐☐ ☐ 1

III. NAME OF INSTALLATION

IV. INSTALLATION MAILING ADDRESS

STREET OR P.O. BOX

3

CITY OR TOWN	ST.	ZIP CODE
4		

V. LOCATION OF INSTALLATION

STREET OR ROUTE NUMBER

5

CITY OR TOWN	ST.	ZIP CODE
6		

VI. INSTALLATION CONTACT

NAME *(last and first)*	PHONE NO. *(area code & no.)*
2	- -

VII. TRANSPORTATION SERVICES USED *(for Part A reports only)*

List the EPA Identification Numbers for those transporters whose services were used during the reporting year represented by this report.

VIII. COST ESTIMATES FOR FACILITIES *(for Part B reports only)*

A. COST ESTIMATE FOR FACILITY CLOSURE	B. COST ESTIMATE FOR POST CLOSURE MONITORING AND MAINTENANCE *(disposal facilities only)*
$, ,	$, ,

IX. CERTIFICATION

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

A. PRINT OR TYPE NAME ____________________

B. SIGNATURE ____________________

C. DATE SIGNED ____________________

EPA Form 8700-13 (4-80)

PAGE 1 OF ______

GSA No. 12345-XX
Form Approved OMB No. 158-R0XX

Please print or type with ELITE type (12 characters/inch).

U.S. ENVIRONMENTAL PROTECTION AGENCY

EPA

FACILITY REPORT – PARTS B & C

(Collected under the authority of Section 3004 of RCRA.)

FOR OFFICIAL USE ONLY (Items 1 & 2)

1. DATE RECEIVED __ - __ - 19 __

2. RECEIVED BY

XVI. TYPE OF REPORT (enter an "X")

☐ PART B ☐ PART C

XVII. FACILITY'S EPA I.D. NO. G T/A C 1

XVIII. GENERATOR'S EPA I.D. NO.

XIX. GENERATOR NAME (specify)

XX. GENERATOR ADDRESS (street or P.O. box, city, state, & zip code)

XXI. WASTE IDENTIFICATION

LINE NUMBER	A. DESCRIPTION OF WASTE	B. EPA HAZARDOUS WASTE NUMBER (see instructions)	C. HANDLING METHOD (enter code)	D. AMOUNT OF WASTE	E. UNIT OF MEASURE (enter code)
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					

XXII. COMMENTS (enter information by line number — see instructions)

EPA Form 8700-123 (5-80)

PAGE ____ OF ____

BILLING CODE 6560-01-C

General Instructions Hazardous Waste Report (EPA Form 8700–13)

Important: Read all instructions before completing this form.

Section I.—Type of Hazardous Waste Report

Part A—Generator Annual Report

For generators who ship their waste off-site to facilities which they do not own or operate: fill in the reporting year for this report (e.g., 1982).

Note.—Generators who ship hazardous waste off-site to a facility which they own or operate must complete the facility (Part B) report instead of the Part A report.

Part B—Facility Annual Report

For owners or operators of on-site or off-site facilities that treat, store, or dispose of hazardous waste; fill in the reporting year for this report (e.g., 1982).

Part C—Unmanifested Waste Report

For facility owners or operators who accept for treatment, storage, or disposal any hazardous waste from an off-site source without an accompanying manifest; fill in the date the waste was received at the facility (e.g. 04–12–1982).

Section II. thru Section IV.—Installation I.D. Number, Name of Installation, and Installation Mailing Address

If you received a preprinted lable from EPA, attach it in the space provided and leave Sections II through IV blank. If there is an error or omission on the label, cross out the incorrect information and fill in the appropriate item(s). If you did not receive a preprinted label, complete Section II through Section IV.

Section V.—Location of Installation

If your installation location address is different than the mailing address, enter the location address of your installation.

Section VI.—Installation Contact

Enter the name (last and first) and telephone number of the person whom may be contacted regarding information contained in this report.

Section VII.—Transportation Services Used (For Part A reports ONLY)

List the EPA Identification Number for each transporter whose services you used during the reporting year.

Section VIII.—Cost Estimates for Facilities (For Part B reports ONLY)

A. Enter the most recent cost estimate for facility closure in dollars. See subpart H of 40 CFR part 264 or 265 for more detail.

B. For disposal facilities only, enter the most recent cost estimate for post closure monitoring and maintenance. See Subpart H of 40 CFR Part 264 or 265 for more detail.

Section IX.—Certification

The generator or his authorized representative (Part A reports) or the owner or operator of the facility or his authorized representative (Parts B and C reports) must sign and date the certification where indicated. The printed or typed name of the person signing the report must also be included where indicated.

Note.—Since more than one page is required for each report, enter the page number of each sheet in the lower right corner as well as the total number of pages.

Facility Annual Report Part B Instructions (EPA Form 8700–13B)

Facility Annual Report for owners or operators of on-site or off-site facilities that treat, store, or dispose of hazardous waste.

Note.—Generators who ship hazardous waste off-site to a facility they own or operate must complete this Part B report instead of the Generator (Part A) Annual Report.

Important: Read All Instructions Before Completing This Form

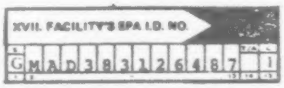
Section XVI.—Type of Report

Put an "X" in the box marked Part B.

Section XVII.—Facility's EPA Identification Number

Enter the EPA identification number for your facility.

Example:



XVII. FACILITY'S EPA I.D. NO.		
G	MAD383126487	1

Section XVIII.—Generator's EPA Identification Number

Enter the EPA identification number of the generator of the waste described under Section XXI which was received by your facility during the reporting year. A separate sheet must be used for each generator. If the waste came from a foreign generator, enter the EPA identification number of the importer in this section and enter the name and address of the foreign generator in Section XXII, Comments. If the waste was generated and treated, stored, or disposed of at the same installation, leave this section blank.

Section XIX.—Generator's Name

Enter the name of the generator corresponding to the generator's EPA identification number in Section XVIII.

If the waste was generated and treated, stored, or disposed of at the same installation, enter "ON–SITE".

If the waste came from a foreign generator, enter the name of the importer corresponding to the EPA identification number in Section XVIII.

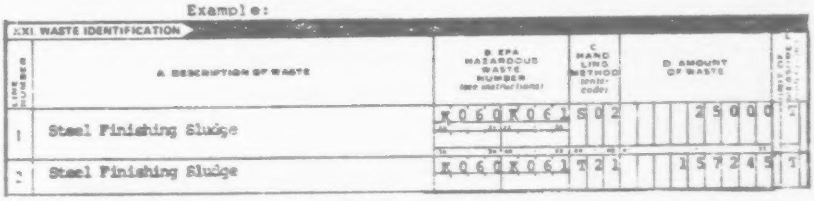
Section XX.—Generator's Address

Enter the address of the generator corresponding to the generator's EPA identification number in Section XVIII. If the waste was generated and treated, stored, or disposed of at the same installation, leave this section blank. If the waste came from a foreign generator, enter the address of the importer corresponding to the EPA identification number in Section XVIII.

Section XXI.—Waste Identification

All information in this section must be entered by line number. A separate line entry is required for each different waste or mixture of wastes that your facility received during the reporting year. The handling code applicable to that waste at the end of the reporting year should be reported. If a different handling code applies to portions of the same waste, (e.g., part of the waste is stored while the remainder was "chemically fixed" during the year), use a separate line entry for each portion.

Example:



XXI. WASTE IDENTIFICATION

LINE NUMBER	A. DESCRIPTION OF WASTE	B. EPA HAZARDOUS WASTE NUMBER (see instructions)	C. HANDLING METHOD (enter code)	D. AMOUNT OF WASTE	[illegible]
1	Steel Finishing Sludge	K060 K061	S02	25000	T
2	Steel Finishing Sludge	K060 K061	T21	157245	T

Section XXI–A.—Description of Waste

For hazardous wastes that are listed under 40 CFR Part 261, Subpart D, enter the EPA listed name, abbreviated if necessary. Where mixtures of listed wastes were received, enter the description which you believe best describes the waste.

For unlisted hazardous waste identified under 40 CFR Part 261, Subpart C, enter the description which you believe best describes the waste. Include the specific manufacturing or other process generating the waste (e.g., green sludge from widget manufacturing) and if known, the chemical or generic chemical name of the waste.

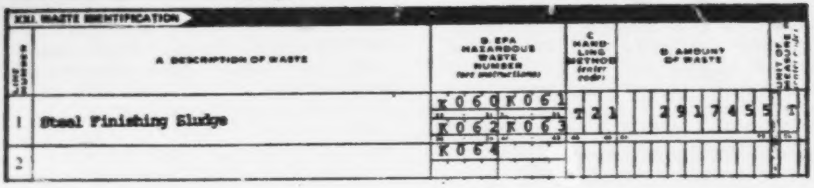
Section XXI–B.—EPA Hazardous Waste Number

For listed waste, enter the four digit EPA Hazardous Waste Number from 40 CFR Part 261, Subpart D, which identifies the waste.

For a mixture of more than one listed waste, enter each of the applicable EPA Hazardous Waste Numbers.

Four spaces are provided. If more space is needed, continue on the next line(s) and leave all other information on that line blank.

Example:



XXI. WASTE IDENTIFICATION

LINE NUMBER	A. DESCRIPTION OF WASTE	B. EPA HAZARDOUS WASTE NUMBER (see instructions)	C. HANDLING METHOD (enter code)	D. AMOUNT OF WASTE	E. UNIT OF MEASURE (enter code)
1	Steel Finishing Sludge	K060 K061 K062 K063	T21	2917455	T
2		K064			

For unlisted hazardous wastes, enter the EPA Hazardous Waste Numbers from 40 CFR Part 261, Subpart C, applicable to the waste. If more than four spaces are required, follow the procedure described above.

Section XXI-C.—Handling Code

Enter one EPA handling code for each waste line entry. Where several handling steps have occurred during the year, report only the handling code representing the waste's status at the end of the reporting year or its final disposition. EPA handling codes are given in Appendix I of this Part.

Section XXI-D.—Amount of Waste

Enter the total amount of waste described on this line which you received during this reporting year.

Section XXI-E.—Unit of Measure

Enter the unit of measure code for the quantity of waste described on this line. Units of measure which must be used in this report and the appropriate codes are:

Units of measure	Code
Pounds	P
Short tons (2000 lbs)	T
Kilograms	K
Tonnes (1000 kg)	M

Units of volume may not be used for reporting but must be converted into one of the above units of weight, taking into account the appropriate density or specific gravity of the waste.

Section XXII.—Comments

This space may be used to explain or clarify any entry. If used, enter a cross-reference to the appropriate Section number.

Note.—Since more than one page is required for each report, enter the page number of each sheet in the lower right hand corner as well as the total number of pages.

Where required by 40 CFR 264 or 265, subparts F *or* R, attach ground-water monitoring data to this report.

Unmanifested Waste Report Part C Instructions (EPA Form 8700-13B)

Unmanifested Waste Report for facility owners or operators who accept for treatment, storage, or disposal any hazardous waste from an off-site source without an accompanying manifest.

Important: Read All Instructions Before Completing This Form

For the Unmanifested Waste Report, EPA Forms 8700-13 and 8700-13B must be filled out according to the directions for the Part-B Facility Annual Report except that: (1) blocks for which information is not available to the owner or operator of the reporting facility may be marked "UNKNOWN," and (2) the following special instructions apply:

Section VIII.—Cost Estimates for Facilities

Do not enter closure or post-closure cost estimates.

Section XVI.—Type of Report

Put an "X" in the box marked Part C.

Section XXI-A.—Description of Waste

Use as many line numbers as are needed to describe the waste.

Section XXI-C.—Handling Code

Enter the handling code which describes the status of the waste on the date the report is filed.

Section XXI-D.—Amount of Waste

Enter the amount of waste received, rather than a total annual aggregate.

Section XXII.—Comments

a. Enter the EPA Identification number, name, and address of the transporter, if known. If the transporter is not known to you, enter the name and chauffeur license number of the driver and the State and license number of the transporting vehicle which presented the waste to your facility, if known.

b. Enter an explanation of how the waste movement was presented to your facility; why you believe the waste is hazardous; and how your facility plans to manage the wastes. Continue on a separate blank sheet of paper if additional space is needed.

Monitoring Data

Do not attach monitoring data.

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

Subpart A—General

Sec.
265.1 Purpose, scope, and applicability.
265.2–265.3 [Reserved]
265.4 Imminent hazard action.
265.5–265.9 [Reserved]

Subpart B—General Facility Standards

265.10 Applicability.
265.11 Idenitification number.
265.12 Required notices.
265.13 General waste analysis.
265.14 Security.
Sec.
265.15 General inspection requirements.
265.16 Personnel training.
265.17 General requirements for ignitable, reactive, or incompatible wastes.
265.18–265.29 [Reserved]

Subpart C—Preparedness and Prevention

265.30 Applicability.
265.31 Maintenance and operation of facility.
265.32 Required equipment.
265.33 Testing and maintenance of equipment.
265.34 Access to communications or alarm system.
265.35 Required aisle space.
265.36 [Reserved]
265.37 Arrangements with local authorities.
265.38–265.49 [Reserved]

Subpart D—Contingency Plan and Emergency Procedures

265.50 Applicability.
265.51 Purpose and implementation of contingency plan.
265.52 Content of contingency plan.
265.53 Copies of contingency plan.
265.54 Amendment of contingency plan.
265.55 Emergency coordinator.
265.56 Emergency procedures.
265.57–265.69 [Reserved]

Subpart E—Manifest System, Recordkeeping, and Reporting

265.70 Applicability.
265.71 Use of manifest system.
265.72 Manifest discrepancies.
265.73 Operating record.
265.74 Availability, retention, and disposition of records.
265.75 Annual report.
265.76 Unmanifested waste report.
265.77 Additional reports.
265.78–265.89 [Reserved]

Subpart F—Ground-Water Monitoring

265.90 Applicability.
265.91 Ground-water monitoring system.
265.92 Sampling and analysis.
265.93 Preparation, evaluation, and response.
265.94 Recordkeeping and reporting.
265.95–265.109 [Reserved]

Subpart G—Closure and Post-Closure

265.110 Applicability.
265.111 Closure performance standard.
265.112 Closure plan; amendment of plan.
265.113 Time allowed for closure.
265.114 Disposal or decontamination of equipment.
265.115 Certification of closure.
265.116 [Reserved]
265.117 Post-closure care and use of property; period of care.
265.118 Post-closure plan; amendment of plan.
265.119 Notice to local land authority.
265.120 Notice in deed to property.
265.121–265.139 [Reserved]

Subpart H—Financial Requirements

Sec.
265.140 Applicability.
265.141 [Reserved]
265.142 Cost estimate for facility closure.
265.143 [Reserved]
265.144 Cost estimate for post-closure monitoring and maintenance.
265.145–265.169 [Reserved]

Subpart I—Use and Management of Containers

265.170 Applicability.
265.171 Condition of containers.
265.172 Compatibility of waste with container.
265.173 Management of containers.
265.174 Inspections.
265.175 [Reserved]
265.176 Special requirements for ignitable or reactive waste.
265.177 Special requirements for incompatible wastes.
265.178–265.189 [Reserved]

Subpart J—Tanks

265.190 Applicability.
265.191 [Reserved]
265.192 General operating requirements.
265.193 Waste analysis and trial tests.
265.194 Inspections.
265.195–265.196 [Reserved]
265.197 Closure.
265.198 Special requirements for ignitable or reactive waste.
265.199 Special requirements for incompatible wastes.
265.200–265.219 [Reserved]

Subpart K—Surface Impoundments

265.220 Applicability.
265.221 [Reserved]
265.222 General operating requirements.
265.223 Containment system.
265.224 [Reserved]
265.225 Waste analysis and trial tests.
265.226 Inspections.
265.227 [Reserved]
265.228 Closure and post-closure.
265.229 Special requirements for ignitable or reactive waste.
265.230 Special requirements for incompatible wastes.
265.231–265.249 [Reserved]

Subpart L—Waste Piles

265.250 Applicability.
265.251 Protection from wind.
265.252 Waste analysis.
265.253 Containment.
265.254–265.255 [Reserved]
265.256 Special requirements for ignitable or reactive waste.
265.257 Special requirements for incompatible wastes.
265.258–265.269 [Reserved]

Subpart M—Land Treatment

265.270 Applicability.
265.271 [Reserved]
265.272 General operating requirements.
265.273 Waste analysis.
265.274–265.275 [Reserved]
265.276 Food chain crops.
265.277 [Reserved]
265.278 Unsaturated zone (zone of aeration) monitoring.

Sec.
265.279 Recordkeeping.
265.280 Closure and post-closure.
265.281 Special requirements for ignitable or reactive waste.
265.282 Special requirements for incompatible wastes.
265.283–265.299 [Reserved]

Subpart N—Landfills

265.300 Applicability
265.301 [Reserved]
265.302 General operating requirements.
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Appendix V—Examples of potentially incompatible waste.

Authority: Secs. 1006, 2002(a), and 3004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), and 6924).

Subpart A—General

§ 265.1 Purpose, scope, and applicability.

(a) The purpose of this Part is to establish minimum national standards which define the acceptable management of hazardous waste during the period of interim status.

(b) The standards in this Part apply to owners and operators of facilities which treat, store, or dispose of hazardous waste who have fully complied with the requirements for interim status under Section 3005(e) of RCRA and § 122.22 of this Chapter, until final administrative disposition of their permit application is made. These standards apply to all treatment, storage, or disposal of hazardous waste at these facilities after the effective date of these regulations, except as specifically provided otherwise in this Part or Part 261 of this Chapter.

[*Comment:* As stated in Section 3005(a) of RCRA, after the effective date of regulations under that Section, i.e., Parts 122 and 124 of this Chapter, the treatment, storage, or disposal of hazardous waste is prohibited except in accordance with a permit. Section 3005(e) of RCRA provides for the continued operation of an existing facility which meets certain conditions until final administrative disposition of the owner's and operator's permit application is made.]

(c) The requirements of this Part do not apply to:

(1) A person disposing of hazardous waste by means of ocean disposal subject to a permit issued under the Marine Protection, Research, and Sanctuaries Act;

[*Comment:* These Part 265 regulations do apply to the treatment or storage of hazardous waste before it is loaded onto an ocean vessel for incineration or disposal at sea, as provided in paragraph (b) of this Section.]

(2) A person disposing of hazardous waste by means of underground injection subject to a permit issued under an Underground Injection Control (UIC) program approved or promulgated under the Safe Drinking Water Act;

[*Comment:* These Part 265 regulations do apply to the aboveground treatment or storage of hazardous waste before it is injected underground. These Part 265 regulations also apply to the disposal of hazardous waste by means of underground injection, as provided in paragraph (b) of this Section, until final administrative disposition of a person's permit application is made under RCRA or under an approved or promulgated UIC program.]

(3) The owner or operator of a POTW which treats, stores, or disposes of hazardous waste;

[*Comment:* The owner or operator of a facility under paragraphs (c)(1) through (c)(3) of this Section is subject to the requirements of Part 264 of this Chapter to the extent they are included in a permit by rule granted to such a person under Part 122 of this Chapter, or are required by § 122.45 of this Chapter.]

(4) A person who treats, stores, or disposes of hazardous waste in a State with a RCRA hazardous waste program authorized under Subparts A and B, or Subpart F, of Part 123 of this Chapter, except that the requirements of this Part will continue to apply as stated in paragraph (c)(2) of this Section, if the authorized State RCRA program does not cover disposal of hazardous waste by means of underground injection;

(5) The owner or operator of a facility permitted, licensed, or registered by a State to manage municipal or industrial solid waste, if the only hazardous waste the facility treats, stores, or disposes of is excluded from regulation under this Part by § 261.5 of this Chapter;

(6) The owner or operator of a facility which treats or stores hazardous waste, which treatment or storage meets the criteria in § 261.6(a) of this Chapter, except to the extent that § 261.6(b) of this Chapter provides otherwise;

(7) A generator accumulating waste on-site in compliance with § 262.34 of this Chapter, except to the extent the requirements are included in § 262.34 of this Chapter;

(8) A farmer disposing of waste pesticides from his own use in compliance with § 262.51 of this Chapter; or

(9) The owner or operator of a totally enclosed treatment facility, as defined in § 260.10.

§§ 265.2–265.3 [Reserved]

§ 265.4 Imminent hazard action.

Notwithstanding any other provisions of these regulations, enforcement actions may be brought pursuant to Section 7003 of RCRA.

§§ 265.5–265.9 [Reserved]

Subpart B—General Facility Standards

§ 265.10 Applicability.

The regulations in this Subpart apply to owners and operators of all hazardous waste facilities, except as § 265.1 provides otherwise.

§ 265.11 Identification number.

Every facility owner or operator must apply to EPA for an EPA identification number in accordance with the EPA notification procedures (45 FR 12746).

§ 265.12 Required notices.

(a) The owner or operator of a facility that has arranged to receive hazardous waste from a foreign source must notify the Regional Administrator in writing at least four weeks in advance of the date of the waste is expected to arrive at the facility. Notice of subsequent shipments of the same waste from the same foreign source is not required.

(b) Before transferring ownership or operation of a facility during its operating life, or of a disposal facility during the post-closure care period, the owner or operator must notify the new owner or operator in writing of the requirements of this Part and Part 122 of this Chapter. (Also see § 122.23(c) of this Chapter.)

[*Comment:* An owner's or operator's failure to notify the new owner or operator of the requirements of this Part in no way relieves the new owner or operator of his obligation to comply with all applicable requirements.]

§ 265.13 General waste analysis.

(a)(1) Before an owner or operator treats, stores, or disposes of any hazardous waste, he must obtain a detailed chemical and physical analysis of a representative sample of the waste. At a minimum, this analysis must contain all the information which must be known to treat, store, or dispose of the waste in accordance with the requirements of this Part.

(2) The analysis may include data developed under Part 261 of this Chapter, and existing published or documented data on the hazardous waste or on waste generated from similar processes.

[*Comment:* For example, the facility's record of analyses performed on the waste before the effective date of these regulations, or studies conducted on hazardous waste generated from processes similar to that which generated the waste to be managed at the facility, may be included in the data base required to comply with paragraph (a)(1) of this Section. The owner or operator of an off-site facility may arrange for the generator of the hazardous waste to supply part or all of the information required by paragraph (a)(1) of this Section. If the generator does not supply the information, and the owner or operator chooses to accept a hazardous waste, the owner or operator is responsible for obtaining the information required to comply with this Section.]

(3) The analysis must be repeated as necessary to ensure that it is accurate and up to date. At a minimum, the analysis must be repeated:

(i) When the owner or operator is notified, or has reason to believe, that the process or operation generating the hazardous waste has changed; and

(ii) For off-site facilities, when the results of the inspection required in paragraph (a)(4) of this Section indicate that the hazardous waste received at the facility does not match the waste designated on the accompanying manifest or shipping paper.

(4) The owner or operator of an off-site facility must inspect and, if necessary, analyze each hazardous waste movement received at the facility to determine whether it matches the identity of the waste specified on the accompanying manifest or shipping paper.

(b) The owner or operator must develop and follow a written waste analysis plan which describes the procedures which he will carry out to comply with paragraph (a) of this Section. He must keep this plan at the facility. At a minimum, the plan must specify:

(1) The parameters for which each hazardous waste will be analyzed and the rationale for the selection of these parameters (i.e., how analysis for these parameters will provide sufficient information on the waste's properties to comply with paragraph (a) of this Section);

(2) The test methods which will be used to test for these parameters;

(3) The sampling method which will be used to obtain a representative sample of the waste to be analyzed. A representative sample may be obtained using either:

(i) One of the sampling methods described in Appendix I of Part 261 of this Chapter; or

(ii) An equivalent sampling method.

[*Comment:* See § 260.20(c) of this Chapter for related discussion.]

(4) The frequency with which the initial analysis of the waste will be reviewed or repeated to ensure that the analysis is accurate and up to date;

(5) For off-site facilities, the waste analyses that hazardous waste generators have agreed to supply; and

(6) Where applicable, the methods which will be used to meet the additional waste analysis requirements for specific waste management methods as specified in §§ 265.193, 265.225, 265.252, 265.273, 265.345, 265.375, and 265.402.

(c) For off-site facilities, the waste analysis plan required in paragraph (b) of this Section must also specify the procedures which will be used to inspect and, if necessary, analyze each movement of hazardous waste received at the facility to ensure that it matches the identity of the waste designated on the accompanying manifest or shipping paper. At a minimum, the plan must describe:

(1) The procedures which will be used to determine the identity of each movement of waste managed at the facility; and

(2) The sampling method which will be used to obtain a representative sample of the waste to be identified, if the identification method includes sampling.

§ 265.14 Security.

(a) The owner or operator must prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of his facility, *unless:*

(1) Physical contact with the waste, structures, or equipment with the active portion of the facility will not injure unknowing or unauthorized persons or livestock which may enter the active portion of a facility, and

(2) Disturbance of the waste or equipment, by the unknowing or unauthorized entry of persons or livestock onto the active portion of a facility, will not cause a violation of the requirements of this Part.

(b) Unless exempt under paragraphs (a)(1) and (a)(2) of this Section, a facility must have:

(1) A 24-hour surveillance system (e.g., television monitoring or surveillance by guards of facility personnel) which continuously monitors and controls entry onto the active portion of the facility; or

(2)(i) An artificial or natural barrier (e.g., a fence in good repair or a fence combined with a cliff), which completely surrounds the active portion of the facility; and

(ii) A means to control entry, at all times, through the gates or other entrances to the active portion of the facility (e.g., an attendant, television monitors, locked entrance, or controlled roadway access to the facility).

[*Comment:* The requirements of paragraph (b) of this Section are satisfied if the facility or plant within which the active portion is located itself has a surveillance system, or a barrier and a means to control entry, which complies with the requirements of paragraph (b)(1) or (b)(2) of this Section.]

(c) Unless exempt under paragraphs (a)(1) and (a)(2) of this Section, a sign with the legend, "Danger—Unauthorized Personnel Keep Out," must be posted at each entrance to the active portion of a facility, and at other locations, in sufficient numbers to be seen from any approach to this active portion. The legend must be written in English and in any other language predominant in the area surrounding the facility (e.g., facilities in counties bordering the Canadian province of Quebec must post signs in French; facilities in counties bordering Mexico must post signs in Spanish), and must be legible from a distance of at least 25 feet. Existing signs with a legend other than "Danger—Unauthorized Personnel Keep Out" may be used if the legend on the sign indicates that only authorized personnel are allowed to enter the active portion, and that entry onto the active portion can be dangerous.

[*Comment:* See § 265.117(b) for discussion of security requirements at disposal facilities during the post-closure care period.]

§ 265.15 General inspection requirements.

(a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing—or may lead to—(1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

(b)(1) The owner or operator must develop and follow a written schedule for inspecting all monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of possible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction or any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use. At a minimum, the inspection schedule must include the items and frequencies called for in §§ 265.174, 265.194, 265.226, 265.347, 265.377, and 265.403.

(c) The owner or operator must remedy any deterioration or malfunction of equipment or structures which the inspection reveals on a schedule which ensures that the problem does not lead to an environmental or human health hazard. Where a hazard is imminent or has already occurred, remedial action must be taken immediately.

(d) The owner or operator must record inspections in an inspection log or summary. He must keep these records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector, a notation of the observations made, and the date and nature of any repairs or other remedial actions.

§ 265.16 Personnel training.

(a)(1) Facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with the requirements of this Part. The owner or operator must ensure that this program includes all the elements described in the document required under paragraph (d)(3) of this Section.

(2) This program must be directed by a person trained in hazardous waste management procedures, and must include instruction which teaches facility personnel hazardous waste management procedures (including contingency plan implementation) relevant to the positions in which they are employed.

(3) At a minimum, the training program must be designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment, and emergency systems, including where applicable:

(i) Procedures for using, inspecting, repairing, and replacing facility emergency and monitoring equipment;

(ii) Key parameters for automatic waste feed cut-off systems;

(iii) Communications or alarm systems;

(iv) Response to fires or explosions;

(v) Response to ground-water contamination incidents; and

(vi) Shutdown of operations.

(b) Facility personnel must successfuly complete the program required in paragraph (a) of this Section within six months after the effective date of these regulations or six months after the date of their employment or assignment to a facility, or to a new position at a facility, whichever is later. Employees hired after the effective date of these regulations must not work in unsupervised positions until they have completed the training requirements of paragraph (a) of this Section.

(c) Facility personnel must take part in an annual review of the initial training required in paragraph (a) of this Section.

(d) The owner or operator must maintain the following documents and records at the facility:

(1) The job title for each position at the facility related to hazardous waste management, and the name of the employee filling each job;

(2) A written job description for each position listed under paragraph (d)(1) of this Section. This description may be consistent in its degree of specificity with descriptions for other similar positions in the same company location or bargaining unit, but must include the requisite skill, education, or other qualifications, and duties of facility personnel assigned to each position;

(3) A written description of the type and amount of both introductory and continuing training that will be given to each person filling a position listed under paragraph (d)(1) of this Section;

(4) Records that document that the training or job experience required under paragraphs (a), (b), and (c) of this Section has been given to, and completed by, facility personnel.

(e) Training records on current personnel must be kept until closure of the facility. Training records on former employees must be kept for at least three years from the date the employee last worked at the facility. Personnel training records may accompany personnel transferred within the same company.

§ 265.17 General requirements for ignitable, reactive, or incompatible wastes.

(a) The owner or operator must take precautions to prevent accidental ignition or reaction of ignitable or reactive waste. This waste must be separated and protected from sources of ignition or reaction including but not limited to: open flames, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical, or mechanical), spontaneous ignition (e.g., from heat-producing chemical reactions), and radiant heat. While ignitable or reactive waste is being handled, the owner or operator must confine smoking and open flame to specially designated locations. "No Smoking" signs must be conspicuously placed wherever there is a hazard from ignitable or reactive waste.

(b) Where specifically required by other Sections of this Part, the treatment, storage, or disposal of ignitable or reactive waste, and the mixture or commingling of incompatible wastes, or incompatible wastes and materials, must be conducted so that it does not:

(1) Generate extreme heat or pressure, fire or explosion, or violent reaction;

(2) Produce uncontrolled toxic mists, fumes, dusts, or gases in sufficient quantities to threaten human health;

(3) Produce uncontrolled flammable fumes or gases in sufficient quantities to pose a risk of fire or explosions;

(4) Damage the structural integrity of the device or facility containing the waste; or

(5) Through other like means threaten human health or the environment.

§§ 265.18–265.29 [Reserved]

Subpart C—Preparedness and Prevention

§ 265.30 Applicability.

The regulations in this Subpart apply to owners and operators of all hazardous waste facilities, except as § 265.1 provides otherwise.

§ 265.31 Maintenance and operation of facility.

Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.

§ 265.32 Required equipment.

All facilities must be equipped with the following, *unless* none of the hazards posed by waste handled at the facility could require a particular kind of equipment specified below:

(a) An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel;

(b) A device, such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or State or local emergency response teams;

(c) Portable fire extinguishers, fire control equipment (including special extinguishing equipment, such as that using foam, inert gas, or dry chemicals), spill control equipment, and decontamination equipment; and

(d) Water at adequate volume and pressure to supply water hose streams, or foam producing equipment, or automatic sprinklers, or water spray systems.

§ 265.33 Testing and maintenance of equipment.

All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency.

§ 265.34 Access to communications or alarm system.

(a) Whenever hazardous waste is being poured, mixed, spread, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, *unless* such a device is not required under § 265.32.

(b) If there is ever just one employee on the premises while the facility is operating, he must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance, *unless* such a device is not required under § 265.32.

§ 265.35 Required aisle space.

The owner or operator must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency, *unless* aisle space is not needed for any of these purposes.

§ 265.36 [Reserved]

§ 265.37 Arrangements with local authorities.

(a) The owner or operator must attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and the potential need for the services of these organizations:

(1) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility, and possible evacuation routes;

(2) Where more than one police and fire department might respond to an emergency, agreements designating

primary emergency authority to a specific police and a specific fire department, and agreements with any others to provide support to the primary emergency authority;

(3) Agreements with State emergency response teams, emergency response contractors, and equipment suppliers; and

(4) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility.

(b) Where State or local authorities decline to enter into such arrangements, the owner or operator must document the refusal in the operating record.

§ 265.38-265.49 [Reserved]

Subpart D—Contingency Plan and Emergency Procedures

§ 265.50 Applicability.

The regulations in this Subpart apply to owners and operators of all hazardous waste facilities, except as § 265.1 provides otherwise.

§ 265.51 Purpose and implementation of contingency plan.

(a) Each owner or operator must have a contingency plan for his facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water.

(b) The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release of hazardous waste or hazardous waste constituents which could threaten human health or the environment.

§ 265.52 Content of contingency plan.

(a) The contingency plan must describe the actions facility personnel must take to comply with §§ 265.51 and 265.56 in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water at the facility.

(b) If the owner or operator has already prepared a Spill Prevention, Control, and Countermeasures (SPCC) Plan in accordance with Part 112 or Part 151 of this Chapter, or some other emergency or contingency plan, he need only amend that plan to incorporate hazardous waste management provisions that are sufficient to comply with the requirements of this Part.

(c) The plan must describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services, pursuant to § 265.37.

(d) The plan must list names, addresses, and phone numbers (office and home) of all persons qualified to act as emergency coordinator (see § 265.55), and this list must be kept up to date. Where more than one person is listed, one must be named as primary emergency coordinator and others must be listed in the order in which they will assume responsibility as alternates.

(e) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list, and a brief outline of its capabilities.

(f) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by releases of hazardous waste or fires).

§ 265.53 Copies of contingency plan.

A copy of the contingency plan and all revisions to the plan must be:

(a) Maintained at the facility; and

(b) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services.

§ 265.54 Amendment of contingency plan.

The contingency plan must be reviewed, and immediately amended, if necessary, whenever:

(a) Applicable regulations are revised;

(b) The plan fails in an emergency;

(c) The facility changes—in its design, construction, operation, maintenance, or other circumstances—in a way that materially increases the potential for fires, explosions, or releases of hazardous waste or hazardous waste constituents, or changes the response necessary in an emergency;

(d) The list of emergency coordinators changes; or

(e) The list of emergency equipment changes.

§ 265.55 Emergency coordinator.

At all times, there must be at least one employee either on the facility premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristics of waste handled, the location of all records within the facility, and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan.

[*Comment:* The emergency coordinator's responsibilities are more fully spelled out in § 265.56. Applicable responsibilities for the emergency coordinator vary, depending on factors such as type and variety of waste(s) handled by the facility, and type and complexity of the facility.]

§ 265.56 Emergency procedures.

(a) Whenever there is an imminent or actual emergency situation, the emergency coordinator (or his designee when the emergency coordinator is on call) must immediately:

(1) Activate internal facility alarms or communication systems, where applicable, to notify all facility personnel; and

(2) Notify appropriate State or local agencies with designated response roles if their help is needed.

(b) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and a real extent of any released materials. He may do this by observation or review of facility records or manifests and, if necessary, by chemical analysis.

(c) Concurrently, the emergency coordinator must assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment must consider both direct and indirect effects of the release, fire, or explosion (e.g., the effects of any toxic, irritating, or asphyxiating gases that are generated, or the effects of any hazardous surface water run-offs from water or chemical agents used to control fire and heat-induced explosions).

(d) If the emergency coordinator determines that the facility has had a release, fire, or explosion which could threaten human health, or the environment, outside the facility, he must report his findings as follows:

(1) If his assessment indicates that evacuation of local areas may be advisable, he must immediately notify appropriate local authorities. He must be available to help appropriate officials decide whether local areas should be evacuated; and

(2) He must immediately notify either the government official designated as the on-scene coordinator for that geographical area (in the applicable regional contingency plan under Part 1510 of this Title), or the National Response Center (using their 24-hour toll free number 800/424-8802). The report must include:

(i) Name and telephone number of reporter;

(ii) Name and address of facility;

(iii) Time and type of incident (e.g., release, fire);

(iv) Name and quantity of material(s) involved, to the extent known;

(v) The extent of injuries, if any; and

(vi) The possible hazards to human health, or the environment, outside the facility.

(e) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other hazardous waste at the facility. These measures must include, where applicable, stopping processes and operations, collecting and containing released waste, and removing or isolating containers.

(f) If the facility stops operations in response to a fire, explosion or release, the emergency coordinator must monitor for leaks, pressure buildup, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(g) Immediately after an emergency, the emergency coordinator must provide for treating, storing, or disposing of recovered waste, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility.

[*Comment:* Unless the owner or operator can demonstrate, in accordance with § 261.3(c) or (d) of this Chapter, that the recovered material is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter.]

(h) The emergency coordinator must ensure that, in the affected area(s) of the facility:

(1) No waste that may be incompatible with the released material is treated, stored, or disposed of until cleanup procedures are completed; and

(2) All emergency equipment listed in the contingency plan is cleaned and fit for its intended use before operations are resumed.

(i) The owner or operator must notify the Regional Administrator, and appropriate State and local authorities, that the facility is in compliance with paragraph (h) of this Section before operations are resumed in the affected area(s) of the facility.

(j) The owner or operator must note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, he must submit a written report on the incident to the Regional Administrator. The report must include:

(1) Name, address, and telephone number of the owner or operator;

(2) Name, address, and telephone number of the facility;

(3) Date, time, and type of incident (e.g., fire, explosion);

(4) Name and quantity of material(s) involved;

(5) The extent of injuries, if any;

(6) An assessment of actual or potential hazards to human health or the environment, where this is applicable; and

(7) Estimated quantity and disposition of recovered material that resulted from the incident.

§§ 265.57–265.69 [Reserved]

Subpart E—Manifest System, Recordkeeping, and Reporting

§ 265.70 Applicability.

The regulations in this Subpart apply to owners and operators of both on-site and off-site facilities, except as § 265.1 provides otherwise. Sections 265.71, 265.72, and 265.76 do not apply to owners and operators of on-site facilities that do not receive any hazardous waste from off-site sources.

§ 265.71 Use of manifest system.

(a) If a facility receives hazardous waste accompanied by a manifest, the owner or operator, or his agent, must:

(1) Sign and date each copy of the manifest to certify that the hazardous waste covered by the manifest was received;

(2) Note any significant discrepancies in the manifest (as defined in § 265.72(a)) on each copy of the manifest;

[*Comment:* The Agency does not intend that the owner or operator of a facility whose procedures under § 265.13(c) include waste analysis must perform that analysis before signing the manifest and giving it to the transporter. Section 265.72(b), however, requires reporting an unreconciled discrepancy discovered during later analysis.]

(3) Immediately give the transporter at least one copy of the signed manifest;

(4) Within 30 days after the delivery, send a copy of the manifest to the generator; and

(5) Retain at the facility a copy of each manifest for at least three years from the date of delivery.

(b) If a facility receives, from a rail or water (bulk shipment) transporter, hazardous waste which is accompanied by a shipping paper containing all the information required on the manifest (excluding the EPA identification numbers, generator's certification, and signatures), the owner or operator, or his agent, must:

(1) Sign and date each copy of the shipping paper to certify that the hazardous waste covered by the shipping paper was received;

(2) Note any significant discrepancies in the shipping paper (as defined in § 265.72(a)) on each copy of the shipping paper;

[*Comment:* The Agency does not intend that the owner or operator of a facility whose procedures under § 265.13(c) include waste analysis must perform that analysis before signing the shipping paper and giving it to the transporter. Section 265.72(b), however, requires reporting an unreconciled discrepancy discovered during later analysis.]

(3) Immediately give the rail or water (bulk shipment) transporter at least one copy of the shipping paper;

(4) Within 30 days after the delivery, send a copy of the shipping paper to the generator; however, if the manifest is received within 30 days after the delivery, the owner or operator, or his agent, must sign and date the manifest and return it to the generator in lieu of the shipping paper; and

[*Comment:* Section 262.23(c) of this Chapter requires the generator to send three copies of the manifest to the facility when hazardous waste is sent by rail or water (bulk shipment).]

(5) Retain at the facility a copy of each shipping paper and manifest for at least three years from the date of delivery.

§ 265.72 Manifest discrepancies.

(a) Manifest discrepancies are differences between the quantity or type of hazardous waste designated on the manifest or shipping paper, and the quantity or type of hazardous waste a facility actually receives. Significant discrepancies in quantity are: (1) for bulk waste, variations greater than 10 percent in weight, and (2) for batch waste, any variation in piece count, such as a discrepancy of one drum in a truckload. Significant discrepancies in type are obvious differences which can be discovered by inspection or waste analysis, such as waste solvent substituted for waste acid, or toxic constituents not reported on the manifest or shipping paper.

(b) Upon discovering a significant discrepancy, the owner or operator must attempt to reconcile the discrepancy with the waste generator or transporter (e.g., with telephone conversations). If the discrepancy is not resolved within 15 days after receiving the waste, the owner or operator must immediately submit to the Regional Administrator a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest or shipping paper at issue.

§ 265.73 Operating record.

(a) The owner or operator must keep a written operating record at his facility.

(b) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:

(1) A description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or disposal at the facility as required by Appendix I;

(2) The location of each hazardous waste within the facility and the quantity at each location. For disposal facilities, the location and quantity of each hazardous waste must be recorded on a map or diagram of each cell or disposal area. For all facilities, this information must include cross-references to specific manifest document numbers, if the waste was accompanied by a manifest;

[*Comment:* See §§ 265.119, 265.279, and 265.309 for related requirements.]

(3) Records and results of waste analyses and trial tests performed as specified in §§ 265.13, 265.193, 265.225, 265.252, 265.273, 265.345, 265.375, and 265.402;

(4) Summary reports and details of all incidents that require implementing the contingency plan as specified in § 265.56(j);

(5) Records and results of inspections as required by § 265.15(d) (except these data need be kept only three years);

(6) Monitoring, testing, or analytical data where required by §§ 265.90, 265.94, 265.276, 265.278, 265.280(d)(1), 265.347, and 265.377; and,

[*Comment:* As required by § 265.94, monitoring data at disposal facilities must be kept throughout the post-closure period.]

(7) All closure cost estimates under § 265.142 and, for disposal facilities, all post-closure cost estimates under § 265.144.

§ 265.74 Availability, retention, and disposition of records.

(a) All records, including plans, required under this Part must be furnished upon request, and made available at all reasonable times for inspection, by any officer, employee, or representative of EPA who is duly designated by the Administrator.

(b) The retention period for all records required under this Part is extended automatically during the course of any unresolved enforcement action regarding the facility or as requested by the Administrator.

(c) A copy of records of waste disposal locations and quantities under § 265.73(b)(2) must be submitted to the Regional Administrator and local land authority upon closure of the facility (see § 265.119).

§ 265.75 Annual report.

The owner or operator must prepare and submit a single copy of an annual report to the Regional Administrator by March 1 of each year. The report form and instructions in Appendix II must be used for this report. The annual report must cover facility activities during the previous calendar year and must include the following information:

(a) The EPA identification number, name, and address of the facility;

(b) The calendar year covered by the report;

(c) For off-site facilities, the EPA identification number of each hazardous waste generator from which the facility received a hazardous waste during the year; for imported shipments, the report must give the name and address of the foreign generator;

(d) A description and the quantity of each hazardous waste the facility received during the year. For off-site facilities, this information must be listed by EPA identification number of each generator;

(e) The method of treatment, storage, or disposal for each hazardous waste;

(f) Monitoring data under § 265.94(a)(2)(ii) and (iii), and (b)(2), where required;

(g) The most recent closure cost estimate under § 265.142, and, for disposal facilities, the most recent post-closure cost estimate under § 265.144; and

(h) The certification signed by the owner or operator of the facility or his authorized representative.

§ 265.76 Unmanifested waste report.

If a facility accepts for treatment, storage, or disposal any hazardous waste from an off-site source without an accompanying manifest, or without an accompanying shipping paper as described in § 263.20(e)(2) of this Chapter, and if the waste is not excluded from the manifest requirement by § 261.5 of this Chapter, then the owner or operator must prepare and submit a single copy of a report to the Regional Administrator within 15 days after receiving the waste. The report form and instructions in Appendix II must be used for this report. The report must include the following information:

(a) The EPA identification number, name, and address of the facility;

(b) The date the facility received the waste;

(c) The EPA identification number, name, and address of the generator and the transporter, if available;

(d) A description and the quantity of each unmanifested hazardous waste the facility received;

(e) The method of treatment, storage, or disposal for each hazardous waste;

(f) The certification signed by the owner or operator of the facility or his authorized representative; and

(g) A brief explanation of why the waste was unmanifested, if known.

[*Comment:* Small quantities of hazardous waste are excluded from regulation under this Part and do not require a manifest. Where a facility receives unmanifested hazardous wastes, the Agency suggests that the owner or operator obtain from each generator a certification that the waste qualifies for exclusion. Otherwise, the Agency suggests that the owner or operator file an unmanifested waste report for the hazardous waste movement.]

§ 265.77 Additional reports.

In addition to submitting the annual report and unmanifested waste reports described in §§ 265.75 and 265.76, the owner or operator must also report to the Regional Administrator:

(a) Releases, fires, and explosions as specified in § 265.56(j);

(b) Ground-water contamination and monitoring data as specified in §§ 265.93 and 265.94; and

(c) Facility closure as specified in § 265.115.

§§ 265.78-265.89 [Reserved]

Subpart F—Ground-Water Monitoring

§ 265.90 Applicability.

(a) Within one year after the effective date of these regulations, the owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste must implement a ground-water monitoring program capable of determining the facility's impact on the quality of ground water in the uppermost aquifer underlying the facility, except as § 265.1 and paragraph (c) of this Section provide otherwise.

(b) Except as paragraphs (c) and (d) of this Section provide otherwise, the owner or operator must install, operate, and maintain a ground-water monitoring system which meets the requirements of § 265.91, and must comply with §§ 265.92–265.94. This ground-water monitoring program must be carried out during the active life of the facility, and for disposal facilities, during the post-closure care period as well.

(c) All or part of the ground-water monitoring requirements of this Subpart may be waived if the owner or operator can demonstrate that there is a low potential for migration of hazardous waste or hazardous waste constituents from the facility via the uppermost aquifer to water supply wells (domestic, industrial, or agricultural) or to surface water. This demonstration must be in writing, and must be kept at the facility. This demonstration must be certified by a qualified geologist or geotechnical engineer and must establish the following:

(1) The potential for migration of hazardous waste or hazardous waste constituents from the facility to the uppermost aquifer, by an evaluation of:

(i) A water balance of precipitation, evapotranspiration, runoff, and infiltration; and

(ii) Unsaturated zone characteristics (i.e., geologic materials, physical properties, and depth to ground water); and

(2) The potential for hazardous waste or hazardous waste constituents which enter the uppermost aquifer to migrate to a water supply well or surface water, by an evaluation of:

(i) Saturated zone characteristics (i.e., geologic materials, physical properties, and rate of ground-water flow); and

(ii) The proximity of the facility to water supply wells or surface water.

(d) If an owner or operator assumes (or knows) that ground-water monitoring of indicator parameters in accordance with §§ 265.91 and 265.92 would show statistically significant increases (or decreases in the case of pH) when evaluated under § 265.93(b), he may, install, operate, and maintain an alternate ground-water monitoring system (other than the one described in §§ 265.91 and 265.92). If the owner or operator decides to use an alternate ground-water monitoring system he must:

(1) Within one year after the effective date of these regulations, submit to the Regional Administrator a specific plan, certified by a qualified geologist or geotechnical engineer, which satisfies the requirements of § 265.93(d)(3), for an alternate ground-water monitoring system;

(2) Not later than one year after the effective date of these regulations, initiate the determinations specified in § 265.93(d)(4);

(3) Prepare and submit a written report in accordance with § 265.93(d)(5);

(4) Continue to make the determinations specified in § 265.93(d)(4) on a quarterly basis until final closure of the facility; and

(5) Comply with the recordkeeping and reporting requirements in § 265.94(b).

§ 265.91 Ground-water monitoring system.

(a) A ground-water monitoring system must be capable of yielding ground-water samples for analysis and must consist of:

(1) Monitoring wells (at least one) installed hydraulically upgradient (i.e., in the direction of increasing static head) from the limit of the waste management area. Their number, locations, and depths must be sufficient to yield ground-water samples that are:

(i) Representative of background ground-water quality in the uppermost aquifer near the facility; and

(ii) Not affected by the facility; and

(2) Monitoring wells (at least three) installed hydraulically downgradient (i.e., in the direction of decreasing static head) at the limit of the waste management area. Their number, locations, and depths must ensure that they immediately detect any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate from the waste management area to the uppermost aquifer.

(b) Separate monitoring systems for each waste management component of a facility are not required provided that provisions for sampling upgradient and downgradient water quality will detect any discharge from the waste management area.

(1) In the case of a facility consisting of only one surface impoundment, landfill, or land treatment area, the waste management area is described by the waste boundary (perimeter).

(2) In the case of a facility consisting of more than one surface impoundment, landfill, or land treatment area, the waste management area is described by an imaginary boundary line which circumscribes the several waste management components.

(c) All monitoring wells must be cased in a manner that maintains the integrity of the monitoring well bore hole. This casing must be screened or perforated, and packed with gravel or sand where necessary, to enable sample collection at depths where appropriate aquifer flow zones exist. The annular space (i.e., the space between the bore hole and well casing) above the sampling depth must be sealed with a suitable material (e.g., cement grout or bentonite slurry) to prevent contamination of samples and the ground water.

§ 265.92 Sampling and analysis.

(a) The owner or operator must obtain and analyze samples from the installed ground-water monitoring system. The owner or operator must develop and follow a ground-water sampling and analysis plan. He must keep this plan at the facility. The plan must include procedures and techniques for:

(1) Sample collection;

(2) Sample preservation and shipment;

(3) Analytical procedures; and

(4) Chain of custody control.

[*Comment:* See "Procedures Manual For Ground-water Monitoring At Solid Waste Disposal Facilities," EPA–530/SW–611, August 1977 and "Methods for Chemical Analysis of Water and Wastes," EPA–600/4–79–020, March 1979 for discussions of sampling and analysis procedures.]

(b) The owner or operator must determine the concentration or value of the following parameters in ground-water samples in accordance with paragraphs (c) and (d) of this section:

(1) Parameters characterizing the suitability of the ground water as a drinking water supply, as specified in Appendix III.

(2) Parameters establishing ground-water quality:

(i) Chloride

(ii) Iron

(iii) Manganese

(iv) Phenols

(v) Sodium

(vi) Sulfate

[*Comment:* These parameters are to be used as a basis for comparison in the event a ground-water quality assessment is required under § 265.93(d).]

(3) Parameters used as indicators of ground-water contamination:

(i) pH

(ii) Specific Conductance

(iii) Total Organic Carbon

(iv) Total Organic Halogen

(c)(1) For all monitoring wells, the owner or operator must establish initial background concentrations or values of all parameters specified in paragraph (b) of this Section. He must do this quarterly for one year.

(2) For each of the indicator parameters specified in paragraph (b)(3) of this Section, at least four replicate measurements must be obtained for each sample and the initial background arithmetic mean and variance must be determined by pooling the replicate measurements for the respective parameter concentrations or values in samples obtained from upgradient wells during the first year.

(d) After the first year, all monitoring wells must be sampled and the samples analyzed with the following frequencies:

(1) Samples collected to establish ground-water quality must be obtained and analyzed for the parameters specified in paragraph (b)(2) of this Section at least annually.

(2) Samples collected to indicate ground-water contamination must be obtained and analyzed for the parameters specified in paragraph (b)(3) of this Section at least semi-annually.

(e) Elevation of the ground-water surface at each monitoring well must be determined each time a sample is obtained.

§ 265.93 Preparation, evaluation, and response.

(a) Within one year after the effective date of these regulations, the owner or operator must prepare an *outline* of a ground-water quality assessment program. The outline must describe a more comprehensive ground-water monitoring program (than that described in §§ 265.91 and 265.92) capable of determining:

(1) Whether hazardous waste or hazardous waste constituents have entered the ground water;

(2) The rate and extent of migration of hazardous waste or hazardous waste constituents in the ground water; and

(3) The concentrations of hazardous waste or hazardous waste constituents in the ground water.

(b) For each indicator parameter specified in § 265.92(b)(3), the owner or operator must calculate the arithmetic mean and variance, based on at least four replicate measurements on each sample, for each well monitored in accordance with § 265.92(d)(2), and compare these results with its initial background arithmetic mean. The comparison must consider individually each of the wells in the monitoring system, and must use the Student's t-test at the 0.01 level of significance (see Appendix IV) to determine statistically significant increases (and decreases, in the case of pH) over initial background.

(c)(1) If the comparisons for the *upgradient* wells made under paragraph (b) of this Section show a significant increase (or pH decrease), the owner or operator must submit this information in accordance with § 265.94(a)(2)(ii).

(2) If the comparisons for *downgradient* wells made under paragraph (b) of this Section show a significant increase (or pH decrease), the owner or operator must then immediately obtain additional ground-water samples from those downgradient wells where a significant difference was detected, split the samples in two, and obtain analyses of all additional samples to determine whether the significant difference was a result of laboratory error.

(d)(1) If the analyses performed under paragraph (c)(2) of this Section confirm the significant increase (or pH decrease), the owner or operator must provide written notice to the Regional Administrator—within seven days of the date of such confirmation—that the facility may be affecting ground-water quality.

(2) Within 15 days after the notification under paragraph (d)(1) of this Section, the owner or operator must develop and submit to the Regional Administrator a specific plan, based on the outline required under paragraph (a) of this Section and certified by a qualified geologist or geotechnical engineer, for a ground-water quality assessment program at the facility.

(3) The plan to be submitted under § 265.90(d)(1) or paragraph (d)(2) of this Section must specify:

(i) The number, location, and depth of wells;

(ii) Sampling and analytical methods for those hazardous wastes or hazardous waste constituents in the facility;

(iii) Evaluation procedures, including any use of previously-gathered ground-water quality information; and

(iv) A schedule of implementation.

(4) The owner or operator must implement the ground-water quality assessment plan which satisfies the requirements of paragraph (d)(3) of this Section, and, at a minimum, determine:

(i) The rate and extent of migration of the hazardous waste or hazardous waste constituents in the ground water; and

(ii) The concentrations of the hazardous waste or hazardous waste constituents in the ground water.

(5) The owner or operator must make his first determination under paragraph (d)(4) of this Section as soon as technically feasible, and, within 15 days after that determination, submit to the Regional Administrator a written report containing an assessment of the ground-water quality.

(6) If the owners or operator determines, based on the results of the first determination under paragraph (d)(4) of this Section, that no hazardous waste or hazardous waste constituents from the facility have entered the ground water, then he may reinstate the indicator evaluation program described in § 265.92 and paragraph (b) of this Section. If the owner or operator reinstates the indicator evaluation program, he must so notify the Regional Administrator in the report submitted under paragraph (d)(5) of this Section.

(7) If the owner or operator determines, based on the first determination under paragraph (d)(4) of this Section, that hazardous waste or hazardous waste constituents from the facility have entered the ground water, then he:

(i) Must continue to make the determinations required under paragraph (d)(4) of this Section on a quarterly basis until final closure of the facility, if the ground-water quality assessment plan was implemented prior to final closure of the facility; or

(ii) May cease to make the determinations required under paragraph (d)(4) of this Section, if the ground-water quality assessment plan was implemented during the post-closure care period.

(e) Notwithstanding any other provision of this Subpart, any ground-water quality assessment to satisfy the requirements of § 265.93(d)(4) which is initiated prior to final closure of the facility must be completed and reported in accordance with § 265.93(d)(5).

(f) Unless the ground water is monitored to satisfy the requirements of § 265.93(d)(4), at least annually the owner or operator must evaluate the data on ground-water surface elevations obtained under § 265.92(e) to determine whether the requirements under § 265.91(a) for locating the monitoring wells continues to be satisfied. If the evaluation shows that § 265.91(a) is no longer satisfied, the owner or operator must immediately modify the number, location, or depth of the monitoring wells to bring the ground-water monitoring system into compliance with this requirement.

§ 265.94 Recordkeeping and reporting.

(a) Unless the ground water is monitored to satisfy the requirements of § 265.93(d)(4), the owner or operator must:

(1) Keep records of the analyses required in § 265.92(c) and (d), the associated ground-water surface elevations required in § 265.92(e), and

the evaluations required in § 265.93(b) throughout the active life of the facility, and, for disposal facilities, throughout the post-closure care period as well; and

(2) Report the following ground-water monitoring information to the Regional Administrator:

(i) During the first year when initial background concentrations are being established for the facility: concentrations or values of the parameters listed in § 265.92(b)(1) for each ground-water monitoring well within 15 days after completing each quarterly analysis. The owner or operator must separately identify for each monitoring well any parameters whose concentration or value has been found to exceed the maximum contaminant levels listed in Appendix III.

(ii) Annually: concentrations or values of the parameters listed in § 265.92(b)(3) for each ground-water monitoring well, along with the required evaluations for these parameters under § 265.93(b). The owner or operator must separately identify any significant differences from initial background found in the upgradient wells, in accordance with § 265.93(c)(1). During the active life of the facility, this information must be submitted as part of the annual report required under § 265.75.

(iii) As a part of the annual report required under § 265.75: results of the evaluation of ground-water surface elevations under § 265.93(f), and a description of the response to that evaluation, where applicable.

(b) If the ground water is monitored to satisfy the requirements of § 265.93(d)(4), the owner or operator must:

(1) Keep records of the analyses and evaluations specified in the plan, which satisfies the requirements of § 265.93(d)(3), throughout the active life of the facility, and, for disposal facilities, throughout the post-closure care period as well; and

(2) Annually, until final closure of the facility, submit to the Regional Administrator a report containing the results of his ground-water quality assessment program which includes, but is not limited to, the calculated (or measured) rate of migration of hazardous waste or hazardous waste constituents in the ground water during the reporting period. This report must be submitted as part of the annual report required under § 265.75.

§§ 265.95–265.109 [Reserved]

Subpart G—Closure and Post-Closure

§ 265.110 Applicability.

Except as § 265.1 provides otherwise:

(a) Sections 265.111–265.115 (which concern closure) apply to the owners and operators of all hazardous waste facilities; and

(b) Sections 265.117–265.120 (which concern post-closure care) apply to the owners and operators of all disposal facilities.

§ 265.111 Closure performance standard.

The owner or operator must close his facility in a manner that: (a) minimizes the need for further maintenance, and (b) controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous waste constituents, leachate, contaminated rainfall, or waste decomposition products to the ground water, or surface waters, or to the atmosphere.

§ 265.112 Closure plan; amendment of plan.

(a) On the effective date of these regulations, the owner or operator must have a written closure plan. He must keep this plan at the facility. This plan must identify the steps necessary to completely close the facility at any point during its intended life and at the end of its intended life. The closure plan must include, at least:

(1) A description of how and when the facility will be partially closed, if applicable, and ultimately closed. The description must identify the maximum extent of the operation which will be be unclosed during the life of the facility, and how the requirements of § 265.111 and the applicable closure requirements of §§ 265.197, 265.228, 265.280, 265.310, 265.351, 265.381, and 265.404 will be met;

(2) An estimate of the maximum inventory of wastes in storage or in treatment at any given time during the life of the facility;

(3) A description of the steps needed to decontaminate facility equipment during closure; and

(4) A schedule for final closure which must include, as a minimum, the anticipated date when wastes will no longer be received, the date when completion of final closure is anticipated, and intervening milestone dates which will allow tracking of the progress of closure. (For example, the expected date for completing treatment or disposal of waste inventory must be included, as must the planned date for removing any residual wastes from storage facilities and treatment processes.)

(b) The owner or operator may amend his closure plan at any time during the active life of the facility. (The active life of the facility is that period during which wastes are periodically received.) The owner or operator must amend his plan any time changes in operating plans or facility design affect the closure plan.

(c) The owner or operator must submit his closure plan to the Regional Administrator at least 180 days before the date he expects to begin closure. The Regional Administrator will modify, approve, or disapprove the plan within 90 days of receipt and after providing the owner or operator and the affected public (through a newspaper notice) the opportunity to submit written comments. If an owner or operator plans to begin closure within 180 days after the effective date of these regulations, he must submit the necessary plans on the effective date of these regulations.

§ 265.113 Time allowed for closure.

(a) Within 90 days after receiving the final volume of hazardous wastes, the owner or operator must treat all hazardous wastes in storage or in treatment, or remove them from the site, or dispose of them on-site, in accordance with the approved closure plan.

(b) The owner or operator must complete closure activities in accordance with the approved closure plan and within six months after receiving the final volume of wastes. The Regional Administrator may approve a longer closure period under § 265.112(c) if the owner or operator can demonstrate that: (1) the required or planned closure activities will, of necessity, take him longer than six months to complete, and (2) that he has taken all steps to eliminate any significant threat to human health and the environment from the unclosed but inactive facility.

§ 265.114 Disposal or decontamination of equipment.

When closure is completed, all facility equipment and structures must have been properly disposed of, or decontaminated by removing all hazardous waste and residues.

§ 265.115 Certification of closure.

When closure is completed, the owner or operator must submit to the Regional Administrator certification both by the owner or operator and by an independent registered professional engineer that the facility has been closed in accordance with the specifications in the approved closure plan.

§ 265.116 [Reserved]

§ 265.117 Post-closure care and use of property; period of care.

(a) Post-closure care must consist of at least:

(1) Ground-water monitoring and reporting in accordance with the requirements of Subpart F; and

(2) Maintenance of monitoring and waste containment systems as specified in §§ 265.91, 265.223, 265.228, 265.280, and 265.310, where applicable.

(b) The Regional Administrator may require maintenance of any or all of the security requirements of § 265.14 during the post-closure period, when:

(1) Wastes may remain exposed after completion of closure; or

(2) Short term, incidental access by the public or domestic livestock may pose a hazard to human health.

(c) Post-closure use of property on or in which hazardous waste remains after closure must never be allowed to disturb the integrity of the final cover, liner(s), or any other components of any containment system, or the function of the facility's monitoring systems, unless the owner or operator can demonstrate to the Regional Administrator, either in the post-closure plan or by petition, that the disturbance:

(1) Is necessary to the proposed use of the property, and will not increase the potential hazard to human health or the environment; or

(2) Is necessary to reduce a threat to human health or the environment.

(d) The owner or operator of a disposal facility must provide post-closure care in accordance with the approved post-closure plan for at least 30 years after the date of completing closure. *However,* the owner or operator may petition the Regional Administrator to allow some or all of the requirements for post-closure care to be discontinued or altered before the end of the 30-year period. The petition must include evidence demonstrating the secure nature of the facility that makes continuing the specified post-closure requirement(s) unnecessary—e.g., no detected leaks and none likely to occur, characteristics of the waste, application of advanced technology, or alternative disposal, treatment, or re-use techniques. Alternately, the Regional Administrator may require the owner or operator to continue one or more of the post-closure care and maintenance requirements contained in the facility's post-closure plan for a specified period of time. The Regional Administrator may do this if he finds there has been noncompliance with any applicable standards or requirements, or that such continuation is necessary to protect human health or the environment. At the end of the specified period of time, the Regional Administrator will determine whether to continue or terminate post-closure care and maintenance at the facility. Anyone (a member of the public as well as the owner or operator) may petition the Regional Administrator for an extension or reduction of the post-closure care period based on cause. These petitions will be considered by the Regional Administrator at the time the post-closure plan is submitted and at five-year intervals after the completion of closure.

§ 265.118 Post-closure plan; amendment of plan.

(a) On the effective date of these regulations, the owner or operator of a disposal facility must have a written post-closure plan. He must keep this plan at the facility. This plan must identify the activities which will be carried on after final closure and the frequency of those activities. The post-closure plan must include at least:

(1) Ground-water monitoring activities and frequencies as specified in Subpart F for the post-closure period; and

(2) Maintenance activities and frequencies to ensure: (1) the integrity of the cap and final cover or other containment structures as specified in §§ 265.223, 265.228, 265.280, and 265.310, where applicable, and (2) the function of the facility's monitoring equipment as specified in § 265.91.

(b) The owner or operator may amend his post-closure plan at any time during the active life of the disposal facility or during the post-closure care period. The owner or operator must amend his plan any time changes in operating plans or facilities design affect his post-closure plan.

(c) The owner or operator of a disposal facility must submit his post-closure plan to the Regional Administrator at least 180 days before the date he expects to begin closure. The Regional Administrator will modify or approve the plan within 90 days of receipt and after providing the owner or operator and the affected public (through a newspaper notice) the opportunity to submit written comments. The plan may be modified to include security equipment maintenance under § 265.117(b). If an owner or operator of a disposal facility plans to begin closure within 180 days after the effective date of these regulations, he must submit the necessary plans on the effective date of these regulations. Any amendments to the plan under paragraph (b) of this Section which occur after approval of the plan must also be approved by the Regional Administrator before they may be implemented.

§ 265.119 Notice to local land authority.

Within 90 days after closure is completed, the owner or operator of a disposal facility must submit to the local land authority and to the Regional Administrator a survey plat indicating the location and dimensions of landfill cells or other disposal areas with respect to permanently surveyed benchmarks. This plat must be prepared and certified by a professional land surveyor. The plat filed with the local land authority must contain a note, prominently displayed, which states the owner's or operator's obligation to restrict disturbance of the site as specified in § 265.117(c). In addition, the owner or operator must submit to the Regional Administrator and to the local land authority a record of the type, location, and quantity of hazardous wastes disposed of within each cell or area of the facility. For wastes disposed of before these regulations were promulgated, the owner or operator must identify the type, location, and quantity of the wastes to the best of his knowledge and in accordance with any records he has kept.

§ 265.120 Notice in deed to property.

The owner of the property on which a disposal facility is located must record, in accordance with State law, a notation on the deed to the facility property—or on some other instrument which is normally examined during title search—that will in perpetuity notify any potential purchaser of the property that: (1) the land has been used to manage hazardous waste, and (2) its use is restricted under § 265.117(c).

§§ 265.121-265.139 [Reserved]

Subpart H—Financial Requirements

§ 265.140 Applicability.

(a) Section 265.142 applies to owners and operators of all hazardous waste facilities, except as this Section or § 265.1 provide otherwise.

(b) Section 265.144 applies only to owners and operators of disposal facilities.

(c) States and the Federal government are exempt from the requirements of this Subpart.

§ 265.141 [Reserved]

§ 265.142 Cost estimate for facility closure.

(a) On the effective date of these regulations, each facility owner or operator must have a written estimate of the cost of closing the facility in accordance with the requirements in §§ 265.111–265.115 and applicable closure requirements in §§ 265.197, 265.228, 265.280, 265.310, 265.351, 265.381, and 265.404. The owner or operator must keep this estimate, and all subsequent estimates required in this Section, at the facility. The estimate must equal the cost of closure at the point in the facility's operating life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan (see § 265.112(a)).

[*Comment:* For example, the closure cost estimate for a particular landfill may be for the cost of closure when its active disposal operations extend over 20 acres, if at all other times these operations extend over less than 20 acres. The estimate would not include costs of partial closures that the closure plan schedules before or after the time of maximum closure cost.]

(b) The owner or operator must prepare a new closure cost estimate whenever a change in the closure plan affects the cost of closure.

(c) On each anniversary of the effective date of these regulations, the owner or operator must adjust the latest closure cost estimate using an inflation factor derived from the annual Implicit Price Deflator for Gross National Product as published by the U.S. Department of Commerce in its *Survey of Current Business.* The inflation factor must be calculated by dividing the latest published annual Deflator by the Deflator for the previous year. The result is the inflation factor. The adjusted closure cost estimate must equal the latest closure cost estimate (see paragraph (b) of this Section) times the inflation factor.

[*Comment:* The following is a sample calculation of the adjusted closure cost estimate: Assume that the latest closure cost estimate for a facility is $50,000, the latest published annual Deflator is 152.05, and the annual Deflator for the previous year is 141.70. The Deflators may be rounded to the nearest whole number. Dividing 152 by 142 gives the inflation factor, 1.07. Multiply $50,000 by 1.07 for a product of $53,500—the adjusted closure cost estimate.]

§ 265.143 [Reserved]

§ 265.144 Cost estimate for post-closure monitoring and maintenance.

(a) On the effective date of these regulations, the owner or operator of a disposal facility must have a written estimate of the annual cost of post-closure monitoring and maintenance of the facility in accordance with the applicable post-closure regulations in §§ 265.117–265.120, 265.228, 265.280, and 265.310. The owner or operator must keep this estimate, and all subsequent estimates required in this Section, at the facility.

(b) The owner or operator must prepare a new annual post-closure cost estimate whenever a change in the post-closure plan affects the cost of post-closure care (see § 265.118(b)). The latest post-closure cost estimate is calculated by multiplying the latest annual post-closure cost estimate by 30.

(c) On each anniversary of the effective date of these regulations, during the operating life of the facility, the owner or operator must adjust the latest post-closure cost estimate using the inflation factor calculated in accordance with § 265.142(c). The adjusted post-closure cost estimate must equal the latest post-closure cost estimate (see paragraph (b) of this Section) times the inflation factor.

§§ 265.145–265.169 [Reserved]

Subpart I—Use and Management of Containers

§ 265.170 Applicability.

The regulations in this Subpart apply to owners and operators of all hazardous waste facilities that store containers of hazardous waste, except as § 265.1 provides otherwise.

§ 265.171 Condition of containers.

If a container holding hazardous waste is not in good condition, or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition, or manage the waste in some other way that complies with the requirements of this Part.

§ 265.172 Compatibility of waste with container.

The owner or operator must use a container made of or lined with materials which will not react with, and are otherwise compatible with, the hazardous waste to be stored, so that the ability of the container to contain the waste is not impaired.

§ 265.173 Management of containers.

(a) A container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.

(b) A container holding hazardous waste must not be opened, handled, or stored in a manner which may rupture the container or cause it to leak.

[*Comment:* A container that is a hazardous waste listed in § 261.33 of this Chapter must be managed in compliance with the regulations of this Part. Re-use of containers in transportation is governed by U.S. Department of Transportation regulations, including those set forth in 49 CFR 173.28.]

§ 265.174 Inspections.

The owner or operator must inspect areas where containers are stored, at least weekly, looking for leaks and for deterioration caused by corrosion or other factors.

[*Comment:* See § 265.171 for remedial action required if deterioration or leaks are detected.]

§ 265.175 [Reserved]

§ 265.176 Special requirements for ignitable or reactive waste.

Containers holding ignitable or reactive waste must be located at least 15 meters (50 feet) from the facility's property line.

[*Comment:* See § 265.17(a) for additional requirements.]

§ 265.177 Special requirements for incompatible wastes.

(a) Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same container, unless § 265.17(b) is complied with.

(b) Hazardous waste must not be placed in an unwashed container that previously held an incompatible waste or material (see Appendix V for examples), unless § 265.17(b) is complied with.

(c) A storage container holding a hazardous waste that is incompatible with any waste or other materials stored nearby in other containers, piles, open tanks, or surface impoundments must be separated from the other materials or protected from them by means of a dike, berm, wall, or other device.

[*Comment:* The purpose of this is to prevent fires, explosions, gaseous emissions, leaching, or other discharge of hazardous waste or hazardous waste constitutuents which could result from the mixing of incompatible wastes or materials if containers break or leak.]

§§ 265.178–265.189 [Reserved]

Subpart J—Tanks

§ 265.190 Applicability.

The regulations in this Subpart apply to owners and operators of facilities that use tanks to treat or store hazardous waste, except as § 265.1 provides otherwise.

§ 265.191 [Reserved]

§ 265.192 General operating requirements.

(a) Treatment or storage of hazardous waste in tanks must comply with § 265.17(b).

(b) Hazardous wastes or treatment reagents must not be placed in a tank if they could cause the tank or its inner liner to rupture, leak, corrode, or otherwise fail before the end of its intended life.

(c) Uncovered tanks must be operated to ensure at least 60 centimeters (2 feet) of freeboard, *unless* the tank is equipped with a containment structure (e.g., dike or trench), a drainage control system, or a diversion structure (e.g., standby tank) with a capacity that equals or exceeds the volume of the top 60 centimeters (2 feet) of the tank.

(d) Where hazardous waste is continuously fed into a tank, the tank must be equipped with a means to stop this inflow (e.g., a waste feed cutoff system or by-pass system to a stand-by tank).

[*Comment:* These systems are intended to be used in the event of a leak or overflow from the tank due to a system failure (e.g., a malfunction in the treatment process, a crack in the tank, etc.).]

§ 265.193 Waste analysis and trial tests.

(a) In addition to the waste analysis required by § 265.13, whenever a tank is to be used to:

(1) Chemically treat or store a hazardous waste which is substantially different from waste previously treated or stored in that tank; or

(2) Chemically treat hazardous waste with a substantially different process than any previously used in that tank; the owner or operator must, before treating or storing the different waste or using the different process:

(i) Conduct waste analyses and trial treatment or storage tests (e.g., bench scale or pilot plant scale tests); or

(ii) Obtain written, documented information on similar storage or treatment of similar waste under similar operating conditions;

to show that this proposed treatment or storage will meet all applicable requirements of § 265.192(a) and (b).

[*Comment: As required by § 265.13, the* waste analysis plan must include analyses needed to comply with §§ 265.198 and 265.199. As required by § 265.73, the owner or operator must place the results from each waste analysis and trial test, or the documented information, in the operating record of the facility.]

§ 265.194 Inspections.

(a) The owner or operator of a tank must inspect, where present:

(1) Discharge control equipment (e.g., waste feed cut-off systems, by-pass systems, and drainage systems), at least once each operating day, to ensure that it is in good working order;

(2) Data gathered from monitoring equipment (e.g., pressure and temperature gauges), at least once each operating day, to ensure that the tank is being operated according to its design;

(3) The level of waste in the tank, at least once each operating day, to ensure compliance with § 265.192(c);

(4) The construction materials of the tank, at least weekly, to detect corrosion or leaking of fixtures or seams; and

(5) The construction materials of, and the area immediately surrounding, discharge confinement structures (e.g., dikes), at least weekly, to detect erosion or obvious signs of leakage (e.g., wet spots or dead vegetation).

[*Comment:* As required by § 265.15(c), the owner or operator must remedy any deterioration or malfunction he finds.]

§§ 265.195–265.196 [Reserved]

§ 265.197 Closure.

At closure, all hazardous waste and hazardous waste residues must be removed from tanks, discharge control equipment, and discharge confinement structures.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3(c) or (d) of this Chapter, that any solid waste removed from his tank is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter.]

§ 265.198 Special requirements for ignitable or reactive waste.

(a) Ignitable or reactive waste must not be placed in a tank, unless:

(1) The waste is treated, rendered, or mixed before or immediately after placement in the tank so that (i) the resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste *under §§ 261.21 or 261.23 of this* Chapter, and (ii) § 265.17(b) is complied with; or

(2) The waste is stored or treated in such a way that it is protected from any material or conditions which may cause the waste to ignite or react; or

(3) The tank is used solely for emergencies.

(b) The owner or operator of a facility which treats or stores ignitable or reactive waste in covered tanks must comply with the National Fire Protection Association's (NFPA's) buffer zone requirements for tanks, contained in Tables 2-1 through 2-6 of the "Flammable and Combustible Code—1977".

[*Comment:* See § 265.17(a) for additional requirements.]

§ 265.199 Special requirements for incompatible wastes.

(a) Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same tank, unless § 265.17(b) is complied with.

(b) Hazardous waste must not be placed in an unwashed tank which previously held an incompatible waste or material, unless § 265.17(b) is complied with.

§§ 265.200–265.219 [Reserved]

Subpart K—Surface Impoundments

§ 265.220 Applicability.

The regulations in this Subpart apply to owners and operators of facilities that use surface impoundments to treat, store, or dispose of hazardous waste, except as § 265.1 provides otherwise.

§ 265.221 [Reserved]

§ 265.222 General operating requirements.

A surface impoundment must maintain enough freeboard to prevent any overtopping of the dike by overfilling, wave action, or a storm. There must be at least 60 centimeters (2 feet) of freeboard.

[*Comment:* Any point source discharge from a surface impoundment to waters of the United States is subject to the requirements of Section 402 of the Clean Water Act, as amended. Spills may be subject to Section 311 of that Act.]

§ 265.223 Containment system.

All earthen dikes must have a protective cover, such as grass, shale, or rock, to minimize wind and water erosion and to preserve their structural integrity.

§ 265.224 [Reserved]

§ 265.225 Waste analysis and trial tests.

(a) In addition to the waste analyses required by § 265.13, whenever a surface impoundment is to be used to:

(1) Chemically treat a hazardous waste which is substantially different from waste previously treated in that impoundment; or

(2) Chemically treat hazardous waste with a substantially different process than any previously used in that impoundment; the owner or operator must, before treating the different waste or using the different process:

(i) Conduct waste analyses and trial treatment tests (e.g., bench scale or pilot plant scale tests); or

(ii) Obtain written, documented information on similar treatment of similar waste under similar operating conditions; to show that this treatment will comply with § 265.17(b).

[*Comment:* As required by § 265.13, the waste analysis plan must include analyses needed to comply with §§ 265.229 and 265.230. As required by § 265.73, the owner or operator must place the results from each waste analysis and trial test, or the documented information, in the operating record of the facility.]

§ 265.226 Inspections.

(a) The owner or operator must inspect:

(1) The freeboard level at least once each operating day to ensure compliance with § 265.222, and

(2) The surface impoundment, including dikes and vegetation surrounding the dike, at least once a week to detect any leaks, deterioration, or failures in the impoundment.

[*Comment:* As required by § 265.15(c), the owner or operator must remedy any deterioration or malfunction he finds.]

§ 265.227 [Reserved]

§ 265.228 Closure and post-closure.

(a) At closure, the owner or operator may elect to remove from the impoundment:

(1) Standing liquids;

(2) Waste and waste residues;

(3) The liner, if any; and

(4) Underlying and surrounding contaminated soil.

(b) If the owner or operator removes all the impoundment materials in paragraph (a) of this Section, or can demonstrate under § 261.3(c) and (d) of this Chapter that none of the materials listed in paragraph (a) of this Section remaining at any stage of removal are hazardous wastes, the impoundment is not further subject to the requirements of this Part.

[*Comment.* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3 (c) or (d) of this Chapter, that any solid waste removed from the surface impoundment is not a hazardous waste, he becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter. The surface impoundment may be subject to Part 257 of this Chapter even if it is not subject to this Part.]

(c) If the owner or operator does not remove all the impoundment materials in paragraph (a) of this Section, or does not make the demonstration in paragraph (b) of this Section, he must close the impoundment and provide post-closure care as for a landfill under Subpart G and § 265.310. If necessary to support the final cover specified in the approved closure plan, the owner or operator must treat remaining liquids, residues, and soils by removal of liquids, drying, or other means.

[*Comment:* The closure requirements under § 265.310 will vary with the amount and nature of the residue remaining, if any, and the degree of contamination of the underlying and surrounding soil. Section 265.117(d) allows the Regional Administrator to vary post-closure care requirements.]

§ 265.229 Special requirements for ignitable or reactive waste.

(a) Ignitable or reactive waste must not be placed in a surface impoundment, unless:

(1) The waste is treated, rendered, or mixed before or immediately after placement in the impoundment so that (i) the resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste under §§ 261.21 or 261.23 of this Chapter, and (ii) § 265.17(b) is complied with; or

(2) The surface impoundment is used solely for emergencies.

§ 265.230 Special requirements for incompatible wastes.

Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same surface impoundment, unless § 265.17(b) is complied with.

§§ 265.231-265.249 [Reserved]

Subpart L—Waste Piles

§ 265.250 Applicability.

The regulations in this Subpart apply to owners and operators of facilities that treat or store hazardous waste in piles, except as § 265.1 provides otherwise. Alternatively, a pile of hazardous waste may be managed as a landfill under Subpart N.

§ 265.251 Protection from wind.

The owner or operator of a pile containing hazardous waste which could be subject to dispersal by wind must cover or otherwise manage the pile so that wind dispersal is controlled.

§ 265.252 Waste analysis.

In addition to the waste analyses required by § 265.13, the owner or operator must analyze a representative sample of waste from each incoming movement before adding the waste to any existing pile, *unless* (1) the only wastes the facility receives which are amenable to piling are compatible with each other, or (2) the waste received is compatible with the waste in the pile to which it is to be added. The analysis conducted must be capable of differentiating between the types of hazardous waste the owner or operator places in piles, so that mixing of incompatible waste does not inadvertently occur. The analysis must include a visual comparison of color and texture.

[*Comment:* As required by § 265.13, the waste analysis plan must include analyses needed to comply with §§ 265.256 and 265.257. As required by § 265.73, the owner or operator must place the results of this analysis in the operating record of the facility.]

§ 265.253 Containment.

If leachate or run-off from a pile is a hazardous waste, then either:

(a) The pile must be placed on an impermeable base that is compatible with the waste under the conditions of treatment or storage, run-on must be diverted away from the pile, and any leachate and run-off from the pile must be collected and managed as a hazardous waste; or

(b)(1) The pile must be protected from precipitation and run-on by some other means; and

(2) No liquids or wastes containing free liquids may be placed in the pile.

[*Comment:* If collected leachate or run-off is discharged through a point source to waters of the United States, it is subject to the requirements of Section 402 of the Clean Water Act, as amended.]

(c) The date for compliance with paragraphs (a) and (b)(1) of this Section is 12 months after the effective date of this Part.

§§ 265.254-265.255 [Reserved]

§ 265.256 Special requirements for ignitable or reactive waste.

(a) Ignitable or reactive wastes must not be placed in a pile, *unless:*

(1) Addition of the waste to an existing pile (i) results in the waste or mixture no longer meeting the definition of ignitable or reactive waste under

§§ 261.21 or 261.23 of this Chapter, and (ii) complies with § 265.17(b), or

(2) The waste is managed in such a way that it is protected from any material or conditions which may cause it to ignite or react.

§ 265.257 Special requirements for incompatible wastes.

(a) Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same pile, unless § 265.17(b) is complied with.

(b) A pile of hazardous waste that is incompatible with any waste or other material stored nearby in other containers, piles, open tanks, or surface impoundments must be separated from the other materials, or protected from them by means of a dike, berm, wall, or other device.

[*Comment:* The purpose of this is to prevent fires, explosions, gaseous emissions, leaching, or other discharge of hazardous waste or hazardous waste constituents which could result from the contact or mixing of incompatible wastes or materials.]

(c) Hazardous waste must not be piled on the same area where incompatible wastes or materials were previously piled, unless that area has been decontaminated sufficiently to ensure compliance with § 265.17(b).

§§ 265.258-265.269 [Reserved]

Subpart M—Land Treatment

§ 265.270 Applicability.

The regulations in this Subpart apply to owners and operators of hazardous waste land treatment facilities, except as § 265.1 provides otherwise.

§ 265.271 [Reserved]

§ 265.272 General operating requirements.

(a) Hazardous waste must not be placed in or on a land treatment facility unless the waste can be made less hazardous or non-hazardous by biological degradation or chemical reactions occurring in or on the soil.

(b) Run-on must be diverted away from the active portions of a land treatment facility.

(c) Run-off from active portions of a land treatment facility must be collected.

[*Comment:* If the collected run-off is a hazardous waste under Part 261 of this Chapter, it must be managed as a hazardous waste in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter. If the collected run-off is discharged through a point source to waters of the United States, it is subject to the requirements of Section 402 of the Clean Water Act, as amended.]

(d) The date for compliance with paragraphs (b) and (c) of this Section is 12 months after the effective date of this Part.

§ 265.273 Waste analysis.

In addition to the waste analyses required by § 265.13, before placing a hazardous waste in or on a land treatment facility, the owner or operator must:

(a) Determine the concentrations in the waste of any substances which exceed the maximum concentrations contained in Table I of § 261.24 of this Chapter that cause a waste to exhibit the EP toxicity characteristic;

(b) For any waste listed in Part 261, Subpart D, of this Chapter, determine the concentrations of any substances which caused the waste to be listed as a hazardous waste; and

(c) If food chain crops are grown, determine the concentrations in the waste of each of the following constituents: arsenic, cadmium, lead, and mercury, *unless* the owner or operator has written, documented data that show that the constituent is not present.

[*Comment:* Part 261 of this Chapter specifies the substances for which a waste is listed as a hazardous waste. As required by § 265.13, the waste analysis plan must include analyses needed to comply with §§ 265.281 and 265.282. As required by § 265.73, the owner or operator must place the results from each waste analysis, or the documented information, in the operating record of the facility.]

§§ 265.274-265.275 [Reserved]

§ 265.276 Food chain crops.

(a) An owner or operator of a hazardous waste land treatment facility on which food chain crops are being grown, or have been grown and will be grown in the future, must notify the Regional Administrator within 60 days after the effective date of this Part.

[*Comment:* The growth of food chain crops at a facility which has never before been used for this purpose is a significant change in process under § 122.23(c)(3) of this Chapter. Owners or operators of such land treatment facilities who propose to grow food chain crops after the effective date of this Part must comply with § 122.23(c)(3) of this Chapter.]

(b)(1) Food chain crops must not be grown on the treated area of a hazardous waste land treatment facility unless the owner or operator can demonstrate, based on field testing, that any arsenic, lead, mercury, or other constituents identified under § 265.273(b):

(i) Will not be transferred to the food portion of the crop by plant uptake or direct contact, and will not otherwise be ingested by food chain animals (e.g., by grazing); or

(ii) Will not occur in greater concentrations in the crops grown on the land treatment facility than in the same crops grown on untreated soils under similar conditions in the same region.

(2) The information necessary to make the demonstration required by paragraph (b)(1) of this Section must be kept at the facility and must, at a minimum:

(i) Be based on tests for the specific waste and application rates being used at the facility; and

(ii) Include descriptions of crop and soil characteristics, sample selection criteria, sample size determination, analytical methods, and statistical procedures.

(c) Food chain crops must not be grown on a land treatment facility receiving waste that contains cadmium unless all requirements of paragraph (c)(1)(i) through (iii) of this Section or all requirements of paragraph (c)(2)(i) through (iv) of this Section are met.

(1) (i) The pH of the waste and soil mixture is 6.5 or greater at the time of each waste application, except for waste containing cadmium at concentrations of 2 mg/kg (dry weight) or less;

(ii) The annual application of cadmium from waste does not exceed 0.5 kilograms per hectare (kg/ha) on land used for production of tobacco, leafy vegetables, or root crops grown for human consumption. For other food chain crops, the annual cadmium application rate does not exceed:

Time period	Annual Cd application rate (kg/ha)
Present to June 30, 1984	2.0
July 1, 1984 to Dec. 31, 1986	1.25
Beginning Jan. 1, 1987	0.5

(iii) The cumulative application of cadmium from waste does not exceed the levels in either paragraph (c)(1)(iii)(A) of this Section or paragraph (c)(1)(iii)(B) of this Section.

(A)

Soil cation exchange capacity (meq/100g)	Maximum cumulative application (kg/ha)	
	Background soil pH less than 6.5	Background soil pH greater than 6.5
Less than 5	5	5
5–15	5	10
Greater than 15	5	20

(B) For soils with a background pH of less than 6.5, the cumulative cadmium application rate does not exceed the levels below: *Provided*, that the pH of the waste and soil mixture is adjusted to and maintained at 6.5 or greater whenever food chain crops are grown.

Soil cation exchange capacity (meq/100g)	Maximum cumulative application (kg/ha)
Less than 5	5
5–15	10
Greater than 15	20

(2)(i) The only food chain crop produced is animal feed.

(ii) The pH of the waste and soil mixture is 6.5 or greater at the time of waste application or at the time the crop is planted, whichever occurs later, and this pH level is maintained whenever food chain crops are grown.

(iii) There is a facility operating plan which demonstrates how the animal feed will be distributed to preclude ingestion by humans. The facility operating plan describes the measures to be taken to safeguard against possible health hazards from cadmium entering the food chain, which may result from alternative land uses.

(iv) Future property owners are notified by a stipulation in the land record or property deed which states that the property has received waste at high cadmium application rates and that food chain crops should not be grown, due to a possible health hazard.

[*Comment:* As required by § 265.73, if an owner or operator grows food chain crops on his land treatment facility, he must place the information developed in this Section in the operating record of the facility.]

§ 265.277 [Reserved]

§ 265.278 Unsaturated zone (zone of aeration) monitoring.

(a) The owner or operator must have in writing, and must implement, an unsaturated zone monitoring plan which is designed to:

(1) Detect the vertical migration of hazardous waste and hazardous waste constituents under the active portion of the land treatment facility, and

(2) Provide information on the background concentrations of the hazardous waste and hazardous waste constituents in similar but untreated soils nearby; this background monitoring must be conducted before or in conjunction with the monitoring required under paragraph (a)(1) of this Section.

(b) The unsaturated zone monitoring plan must include, at a minimum:

(1) Soil monitoring using soil cores, and

(2) Soil-pore water monitoring using devices such as lysimeters.

(c) To comply with paragraph (a)(1) of this Section, the owner or operator must demonstrate in his unsaturated zone monitoring plan that:

(1) The depth at which soil and soil-pore water samples are to be taken is below the depth to which the waste is incorporated into the soil;

(2) The number of soil and soil-pore water samples to be taken is based on the variability of:

(i) The hazardous waste constituents (as identified in § 265.273(a) and (b)) in the waste and in the soil; and

(ii) The soil type(s); and

(3) The frequency and timing of soil and soil-pore water sampling is based on the frequency, time, and rate of waste application, proximity to ground water, and soil permeability.

(d) The owner or operator must keep at the facility his unsaturated zone monitoring plan, and the rationale used in developing this plan.

(e) The owner or operator must analyze the soil and soil-pore water samples for the hazardous waste constituents that were found in the waste during the waste analysis under § 265.273 (a) and (b).

[*Comment:* As required by § 265.73, all data and information developed by the owner or operator under this Section must be placed in the operating record of the facility.]

§ 265.279 Recordkeeping.

The owner or operator of a land treatment facility must keep records of the application dates, application rates, quantities, and location of each hazardous waste placed in the facility, in the operating record required in § 265.73.

§ 265.280 Closure and post-closure.

(a) In the closure plan under § 265.112 and the post-closure plan under § 265.118, the owner or operator must address the following objectives and indicate how they will be achieved:

(1) Control of the migration of hazardous waste and hazardous waste constituents from the treated area into the ground water;

(2) Control of the release of contaminated run-off from the facility into surface water;

(3) Control of the release of airborne particulate contaminants caused by wind erosion; and

(4) Compliance with § 265.276 concerning the growth of food-chain crops.

(b) The owner or operator must consider at least the following factors in addressing the closure and post-closure care objectives of paragraph (a) of this Section:

(1) Type and amount of hazardous waste and hazardous waste constituents applied to the land treatment facility;

(2) The mobility and the expected rate of migration of the hazardous waste and hazardous waste constituents;

(3) Site location, topography, and surrounding land use, with respect to the potential effects of pollutant migration (e.g., proximity to ground water, surface water and drinking water sources);

(4) Climate, including amount, frequency, and pH of precipitation;

(5) Geological and soil profiles and surface and subsurface hydrology of the site, and soil characteristics, including cation exchange capacity, total organic carbon, and pH;

(6) Unsaturated zone monitoring information obtained under § 265.278; and

(7) Type, concentration, and depth of migration of hazardous waste constituents in the soil as compared to their background concentrations.

(c) The owner or operator must consider at least the following methods in addressing the closure and post-closure care objectives of paragraph (a) of this Section:

(1) Removal of contaminated soils;

(2) Placement of a final cover, considering: (i) Functions of the cover (e.g., infiltration control, erosion and run-off control, and wind erosion control), and (ii) Characteristics of the cover, including material, final surface contours, thickness, porosity and permeability, slope, length of run of slope, and type of vegetation on the cover;

(3) Collection and treatment of run-off;

(4) Diversion structures to prevent surface water run-on from entering the treated area; and

(5) Monitoring of soil, soil-pore water, and ground water.

(d) In addition to the requirements of § 265.117, during the post-closure care period, the owner or operator of a land treatment facility must:

(1) Maintain any unsaturated zone monitoring system, and collect and analyze samples from this system in a

manner and frequency specified in the post-closure plan;

(2) Restrict access to the facility as appropriate for its post-closure use; and

(3) Assure that growth of food chain crops complies with § 265.276.

§ 265.281 Special requirements for ignitable or reactive waste.

Ignitable or reactive wastes must not be land treated, unless the waste is immediately incorporated into the soil so that (1) the resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste under §§ 261.21 or 261.23 of this Chapter, and (2) § 265.17(b) is complied with.

§ 265.282 Special requirements for incompatible wastes.

Incompatible wastes, or incompatible wastes and materials (see Appendix V for examples), must not be placed in the same land treatment area, unless § 265.17(b) is complied with.

§§ 265.283–265.299 [Reserved]

Subpart N—Landfills

§ 265.300 Applicability.

The regulations in this Subpart apply to owners and operators of facilities that dispose of hazardous waste in landfills, except as § 265.1 provides otherwise. A waste pile used as a disposal facility is a landfill and is governed by this Subpart.

§ 265.301 [Reserved]

§ 265.302 General operating requirements.

(a) Run-on must be diverted away from the active portions of a landfill.

(b) Run-off from active portions of a landfill must be collected.

[*Comment:* If the collected run-off is a hazardous waste under Part 261 of this Chapter, it must be managed as a hazardous waste in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter. If the collected run-off is discharged through a point source to waters of the United States, it is subject to the requirements of Section 402 of the Clean Water Act, as amended.]

(c) The date for compliance with paragraphs (a) and (b) of this Section is 12 months after the effective date of this Part.

(d) The owner or operator of a landfill containing hazardous waste which is subject to dispersal by wind must cover or otherwise manage the landfill so that wind dispersal of the hazardous waste is controlled.

[*Comment:* As required by § 265.13, the waste analysis plan must include analyses needed to comply with §§ 265.312 and 265.313. As required by § 265.73, the owner or operator must place the results of these analyses in the operating record of the facility.]

§§ 265.303–265.308 [Reserved]

§ 265.309 Surveying and recordkeeping.

The owner or operator of a landfill must maintain the following items in the operating record required in § 265.73:

(a) On a map, the exact location and dimensions, including depth, of each cell with respect to permanently surveyed benchmarks; and

(b) The contents of each cell and the approximate location of each hazardous waste type within each cell.

§ 265.310 Closure and post-closure.

(a) The owner or operator must place a final cover over the landfill, and the closure plan under § 265.112 must specify the function and design of the cover. In the post-closure plan under § 265.118, the owner or operator must include the post-closure care requirements of paragraph (d) of this Section.

(b) In the closure and post-closure plans, the owner or operator must address the following objectives and indicate how they will be achieved:

(1) Control of pollutant migration from the facility via ground water, surface water, and air;

(2) Control of surface water infiltration, including prevention of pooling; and

(3) Prevention of erosion.

(c) The owner or operator must consider at least the following factors in addressing the closure and post-closure care objectives of paragraph (b) of this Section:

(1) Type and amount of hazardous waste and hazardous waste constituents in the landfill;

(2) The mobility and the expected rate of migration of the hazardous waste and hazardous waste constituents;

(3) Site location, topography, and surrounding land use, with respect to the potential effects of pollutant migration (e.g., proximity to ground water, surface water, and drinking water sources);

(4) Climate, including amount, frequency, and pH of precipitation;

(5) Characteristics of the cover including material, final surface contours, thickness, porosity and permeability, slope, length of run of slope, and type of vegetation on the cover; and

(6) Geological and soil profiles and surface and subsurface hydrology of the site.

(b) In addition to the requirements of § 265.117, during the post-closure care period, the owner or operator of a hazardous waste landfill must:

(1) Maintain the function and integrity of the final cover as specified in the approved closure plan;

(2) Maintain and monitor the leachate collection, removal, and treatment system (if there is one present in the landfill) to prevent excess accumulation of leachate in the system;

[*Comment:* If the collected leachate is a hazardous waste under Part 261 of this Chapter, it must be managed as a hazardous waste in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter. If the collected leachate is discharged through a point source to waters of the United States, it is subject to the requirements of Section 402 of the Clean Water Act, as amended.]

(3) Maintain and monitor the gas collection and control system (if there is one present in the landfill) to control the vertical and horizontal escape of gases;

(4) Protect and maintain surveyed benchmarks; and

(5) Restrict access to the landfill as appropriate for its post-closure use.

§ 265.311 [Reserved]

§ 265.312 Special requirements for ignitable or reactive waste.

Ignitable or reactive waste must not be placed in a landfill, unless the waste is treated, rendered, or mixed before or immediately after placement in the landfill so that (1) the resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste under §§ 261.21 or 261.23 of this Chapter, and (2) § 265.17(b) is complied with.

§ 265.313 Special requirements for incompatible wastes.

Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same landfill cell, unless § 265.17(b) is complied with.

§ 265.314 Special requirements for liquid waste.

(a) Bulk or non-containerized liquid waste or waste containing free liquids must not be placed in a landfill, unless:

(1) The landfill has a liner which is chemically and physically resistant to the added liquid, and a functioning leachate collection and removal system with a capacity sufficient to remove all leachate produced; or

(2) Before disposal, the liquid waste or waste containing free liquids is treated or stabilized, chemically or physically (e.g., by mixing with an absorbent solid),

so that free liquids are no longer present.

(b) A container holding liquid waste or waste containing free liquids must not be placed in a landfill, unless:

(1) The container is designed to hold liquids or free liquids for a use other than storage, such as a battery or capacitor; or

(2) The container is very small, such as an ampule.

(c) The date for compliance with this Section is 12 months after the effective date of this Part.

§ 265.315 Special requirements for containers.

(a) An empty container must be crushed flat, shredded, or similarly reduced in volume before it is buried beneath the surface of a landfill.

(b) The date for compliance with this Section is 12 months after the effective date of this Part.

§§ 265.316–265.339 [Reserved]

Subpart O—Incinerators

§ 265.340 Applicability.

The regulations in this Subpart apply to owners and operators of facilities that treat hazardous waste in incinerators, except as § 265.1 provides otherwise.

§§ 265.341–265.342 [Reserved]

§ 265.343 General operating requirements.

Before adding hazardous waste, the owner or operator must bring his incinerator to steady state (normal) conditions of operation—including steady state operating temperature and air flow—using auxiliary fuel or other means.

§ 265.344 [Reserved]

§ 265.345 Waste analysis.

In addition to the waste analyses required by § 265.13, the owner or operator must sufficiently analyze any waste which he has not previously burned in his incinerator to enable him to establish steady state (normal) operating conditions (including waste and auxiliary fuel feed and air flow) and to determine the type of pollutants which might be emitted. At a minimum, the analysis must determine:

(a) Heating value of the waste;

(b) Halogen content and sulfur content in the waste; and

(c) Concentrations in the waste of lead and mercury, *unless* the owner or operator has written, documented data that show that the element is not present.

[*Comment:* As required by § 265.73, the owner or operator must place the results from each waste analysis, or the documented information, in the operating record of the facility.]

§ 265.346 [Reserved]

§ 265.347 Monitoring and inspections.

(a) The owner or operator must conduct, as a minimum, the following monotoring and inspections when incinerating hazardous wastes:

(1) Existing instruments which relate to combustion and emission control must be monitored at least every 15 minutes. Appropriate corrections to maintain steady state combustion conditions must be made immediately either automatically or by the operator. Instruments which relate to combustion and emission control would normally include those measuring waste feed, auxiliary fuel feed, air flow, incinerator temperature, scrubber flow, scrubber pH, and relevant level controls.

(2) The stack plume (emissions) must be observed visually at least hourly for normal appearance (color and opacity). The operator must immediately make any indicated operating corrections necessary to return visible emissions to their normal appearance.

(3) The complete incinerator and associated equipment (pumps, valves, conveyors, pipes, etc.) must be inspected at least daily for leaks, spills, and fugitive emissions, and all emergency shutdown controls and system alarms must be checked to assure proper operation.

§§ 265.348–265.350 [Reserved]

§ 265.351 Closure.

At closure, the owner or operator must remove all hazardous waste and hazardous waste residues (including but not limited to ash, scrubber waters, and scrubber sludges) from the incinerator.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3(c) or (d) of this Chapter, that any solid waste removed from his incinerator is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter.]

§§ 265.352–265.369 [Reserved]

Subpart P—Thermal Treatment

§ 265.370 Applicability.

The regulations in this Subpart apply to owners and operators of facilities that thermally treat hazardous waste in devices other than incinerators, except as § 265.1 provides otherwise. Thermal treatment in incinerators is subject to the requirements of Subpart O.

§§ 265.371–265.372 [Reserved]

§ 265.373 General operating requirements.

Before adding hazardous waste, the owner or operator must bring his thermal treatment process to steady state (normal) conditions of operation—including steady state operating temperature—using auxiliary fuel or other means, unless the process is a non-continuous (batch) thermal treatment process which requires a complete thermal cycle to treat a discrete quantity of hazardous waste.

§ 265.374 [Reserved]

§ 265.375 Waste analysis.

In addition to the waste analyses required by § 265.13, the owner or operator must sufficiently analyze any waste which he has not previously treated in his thermal process to enable him to establish steady state (normal) or other appropriate (for a non-continuous process) operating conditions (including waste and auxiliary fuel feed) and to determine the type of pollutants which might be emitted. At a minimum, the analysis must determine:

(a) Heating value of the waste;

(b) Halogen content and sulfur content in the waste; and

(c) Concentrations in the waste of lead and mercury, *unless* the owner or operator has written, documented data that show that the element is not present.

[*Comment:* As required by § 265.73, the owner or operator must place the results from each waste analysis, or the documented information, in the operating record of the facility.]

§ 265.376 [Reserved]

§ 265.377 Monitoring and inspections.

(a) The owner or operator must conduct, as a minimum, the following monitoring and inspections when thermally treating hazardous waste:

(1) Existing instruments which relate to temperature and emission control (if an emission control device is present) must be monitored at least every 15 minutes. Appropriate corrections to maintain steady state or other appropriate thermal treatment conditions must be made immediately either automatically or by the operator. Instruments which relate to temperature and emission control would normally include those measuring waste feed, auxiliary fuel feed, treatment process temperature, and relevant process flow and level controls.

(2) The stack plume (emissions), where present, must be observed visually at least hourly for normal appearance (color and opacity). The operator must immediately make any indicated operating corrections necessary to return any visible emissions to their normal appearance.

(3) The complete thermal treatment process and associated equipment (pumps, valves, conveyors, pipes, etc.) must be inspected at least daily for leaks, spills, and fugitive emissions, and all emergency shutdown controls and system alarms must be checked to assure proper operation.

§§ 265.378-265.380 [Reserved]

§ 265.381 Closure.

At closure, the owner or operator must remove all hazardous waste and hazardous waste residues (including, but not limited to, ash) from the thermal treatment process or equipment.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3(c) or (d) of this Chapter, that any solid waste removed from his thermal treatment process or equipment is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter.]

§ 265.382 Open burning; waste explosives.

Open burning of hazardous waste is prohibited except for the open burning and detonation of waste explosives. Waste explosives include waste which has the potential to detonate and bulk military propellants which cannot safely be disposed of through other modes of treatment. Detonation is an explosion in which chemical transformation passes through the material faster than the speed of sound (0.33 kilometers/second at sea level). Owners or operators choosing to open burn or detonate waste explosives must do so in accordance with the following table and in a manner that does not threaten human health or the environment.

Pounds of waste explosives or propellants	Minimum distance from open burning or detonation to the property of others
0 to 100	204 meters (670 feet).
101 to 1,000	380 meters (1,250 feet).
1,001 to 10,000	530 meters (1,730 feet).
10,001 to 30,000	690 meters (2,260 feet).

§§ 265.383-265.399 [Reserved]

Subpart Q—Chemical, Physical, and Biological Treatment

§ 265.400 Applicability.

The regulations in this Subpart apply to owners and operators of facilities which treat hazardous wastes by chemical, physical, or biological methods in other than tanks, surface impoundments, and land treatment facilities, except as § 265.1 provides otherwise. Chemical, physical, and biological treatment of hazardous waste in tanks, surface impoundments, and land treatment facilities must be conducted in accordance with Subparts J, K, and M, respectively.

§ 265.401 General operating requirements.

(a) Chemical, physical, or biological treatment of hazardous waste must comply with § 265.17(b).

(b) Hazardous wastes or treatment reagents must not be placed in the treatment process or equipment if they could cause the treatment process or equipment to rupture, leak, corrode, or otherwise fail before the end of its intended life.

(c) Where hazardous waste is continuously fed into a treatment process or equipment, the process or equipment must be equipped with a means to stop this inflow (e.g., a waste feed cut-off system or by-pass system to a standby containment device).

[*Comment:* These systems are intended to be used in the event of a malfunction in the treatment process or equipment.]

§ 265.402 Waste analysis and trial tests.

(a) In addition to the waste analysis required by § 265.13, whenever:

(1) A hazardous waste which is substantially different from waste previously treated in a treatment process or equipment at the facility is to be treated in that process or equipment, or

(2) A substantially different process than any previously used at the facility is to be used to chemically treat hazardous waste;

the owner or operator must, before treating the different waste or using the different process or equipment:

(i) Conduct waste analyses and trial treatment tests (e.g., bench scale or pilot plant scale tests); or

(ii) Obtain written, documented information on similar treatment of similar waste under similar operating conditions;

to show that this proposed treatment will meet all applicable requirements of § 265.401 (a) and (b).

[*Comment:* As required by § 265.13, the waste analysis plan must include analyses needed to comply with §§ 265.405 and 265.406. As required by § 265.73, the owner or operator must place the results from each waste analysis and trial test, or the documented information, in the operating record of the facility.]

§ 265.403 Inspections.

(a) The owner or operator of a treatment facility must inspect, where present:

(1) Discharge control and safety equipment (e.g., waste feed cut-off systems, by-pass systems, drainage systems, and pressure relief systems) at least once each operating day, to ensure that it is in good working order.

(2) Data gathered from monitoring equipment (e.g., pressure and temperature gauges), at least once each operating day, to ensure that the treatment process or equipment is being operated according to its design.

(3) The construction materials of the treatment process or equipment, at least weekly, to detect corrosion or leaking of fixtures or seams; and

(4) The construction materials of, and the area immediately surrounding, discharge confinement structures (e.g., dikes), at least weekly, to detect erosion or obvious signs of leakage (e.g., wet spots or dead vegetation).

[*Comment:* As required by § 265.15(c), the owner or operator must remedy any deterioration or malfunction he finds.]

§ 265.404 Closure.

At closure, all hazardous waste and hazardous waste residues must be removed from treatment processes or equipment, discharge control equipment, and discharge confinement structures.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3 (c) or (d) of this Chapter, that any solid waste removed from his treatment process or equipment is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this Chapter.]

§ 265.405 Special requirements for ignitable or reactive waste.

(a) Ignitable or reactive waste must not be placed in a treatment process or equipment unless:

(1) The waste is treated, rendered, or mixed before or immediately after placement in the treatment process or equipment so that (i) the resulting waste, mixture, or dissolution of material no

longer meets the definition of ignitable or reactive waste under § 261.21 or 261.23 or this Chapter, and (ii) § 265.17(b) is complied with; or (2) The waste is treated in such a way that it is protected from any material or conditions which may cause the waste to ignite or react.

§ 265.406 Special requirements for incompatible wastes.

(a) Incompatible wastes, or incompatible wastes and materials, (see Appendix V for examples) must not be placed in the same treatment process or equipment, unless § 265.17(b) is complied with.

(b) Hazardous waste must not be placed in unwashed treatment equipment which previously held an incompatible waste or material, unless § 265.17(b) is complied with.

§§ 265.407–265.429 [Reserved]

Subpart R—Underground Injection

§ 265.430 Applicability.

Except as § 265.1 provides otherwise:

(a) The owner or operator of a facility which disposes of hazardous waste by underground injection is excluded from the requirements of Subparts G and H of this Part.

(b) The requirements of this Subpart apply to owners and operators of wells used to dispose of hazardous waste which are classified as Class I under § 122.32(a) of this Chapter and which are classified as Class IV under § 122.32(d) of this Chapter.

[*Comment:* In addition to the requirements of Subparts A through E of this Part, the owner or operator of a facility which disposes of hazardous waste by underground injection ultimately must comply with the requirements of §§ 265.431–265.437. These Sections are reserved at this time. The Agency will propose regulations that would establish those requirements.]

§ 265.431–265.999 [Reserved]

Appendix I—Recordkeeping Instructions

The recordkeeping provisions of § 265.73 specify that an owner or operator must keep a written operating record at his facility. This appendix provides additional instructions for keeping *portions* of the operating record. See § 265.73(b) for additional recordkeeping requirements.

The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility in the following manner:

Records of each hazardous waste received, treated, stored, or disposed of at the facility which include the following:

(1) A description by its common name and the EPA Hazardous Waste Number(s) from Part 261 of this Chapter which apply to the waste. The waste description also must include the waste's physical form, i.e., liquid, sludge, solid, or contained gas. If the waste is not listed in Part 261, Subpart D, of this Chapter, the description also must include the process that produced it (for example, solid filter cake from production of ———, EPA Hazardous Waste Number W051).

Each hazardous waste listed in Part 261, Subpart D, of this Chapter, and each hazardous waste characteristic defined in Part 261, Subpart C, of this Chapter, has a four-digit EPA Hazardous Waste Number assigned to it. This number must be used for recordkeeping and reporting purposes. Where a hazardous waste contains more than one listed hazardous waste, or where more than one hazardous waste characteristic applies to the waste, the waste description must include all applicable EPA Hazardous Waste Numbers.

(2) The estimated or manifest-reported weight, or volume and density, where applicable, in one of the units of measure specified in Table 1; and

(3) The method(s) (by handling code(s) as specified in Table 2) and date(s) of treatment, storage, or disposal.

Table 1

Unit of measure	Symbol[1]	Density
Pounds	P	
Short tons (2000 lbs)	T	
Gallons (U.S.)	G	P/G
Cubic yards	Y	T/Y
Kilograms	K	
Tonnes (1000 kg)	M	
Liters	L	K/L
Cubic meters	C	M/C

[1] Single digit symbols are used here for data processing purposes.

Table 2—Handling Codes for Treatment, Storage, amd Disposal Methods

Enter the handling code(s) listed below that most closely represents the technique(s) used at the facility to treat, store, or dispose of each quantity of hazardous waste received.

1. Storage

S01 Container (barrel, drum, etc.)
S02 Tank
S03 Waste pile
S04 Surface impoundment
S05 Other (specify)

2. Treatment

(a) Thermal Treatment

T06 Liquid injection incinerator
T07 Rotary kiln incinerator
T08 Fluidized bed incinerator
T09 Multiple hearth incinerator
T10 Infrared furnace incinerator
T11 Molten salt destructor
T12 Pyrolysis
T13 Wet air oxidation
T14 Calcination
T15 Microwave discharge
T16 Cement kiln
T17 Lime kiln
T18 Other (specify)

(b) Chemical Treatment

T19 Absorption mound
T20 Absorption field
T21 Chemical fixation
T22 Chemical oxidation
T23 Chemical precipitation
T24 Chemical reduction
T25 Chlorination
T26 Chlorinolysis
T27 Cyanide destruction
T28 Degradation
T29 Detoxification
T30 Ion exchange
T31 Neutralization
T32 Ozonation
T33 Photolysis
T34 Other (specify)

(c) Physical Treatment:

(1) Separation of components

T35 Centrifugation
T36 Clarification
T37 Coagulation
T38 Decanting
T39 Encapsulation
T40 Filtration
T41 Flocculation
T42 Flotation
T43 Foaming
T44 Sedimentation
T45 Thickening
T46 Ultrafiltration
T47 Other (specify)

(2) Removal of Specific Components

T48 Absorption-molecular sieve
T49 Activated carbon
T50 Blending
T51 Catalysis
T52 Crystallization
T53 Dialysis
T54 Distillation
T55 Electrodialysis
T56 Electrolysis
T57 Evaporation
T58 High gradient magnetic separation
T59 Leaching
T60 Liquid ion exchange
T61 Liquid-liquid extraction
T62 Reverse osmosis
T63 Solvent recovery
T64 Stripping
T65 Sand filter
T66 Other (specify)

(d) Biological Treatment

T67 Activated sludge
T68 Aerobic lagoon
T69 Aerobic tank
T70 Anaerobic lagoon
T71 Composting
T72 Septic tank
T73 Spray irrigation
T74 Thickening filter
T75 Tricking filter
T76 Waste stabilization pond
T77 Other (specify)
T78–79 [Reserved]

3. Disposal

D80 Underground injection
D81 Landfill
D82 Land treatment
D83 Ocean disposal
D84 Surface impoundment (to be closed as a landfill)
D85 Other (specify)

APPENDIX II—EPA REPORT FORM AND INSTRUCTIONS

BILLING CODE 6560-01-M

GSA No. 12345-XX
Form Approved OMB No. 158-R00XX

Please print or type with ELITE type *(12 characters per inch)*.

EPA U.S. ENVIRONMENTAL PROTECTION AGENCY

HAZARDOUS WASTE REPORT

PLEASE PLACE LABEL IN THIS SPACE

I. TYPE OF HAZARDOUS WASTE REPORT

PART A: GENERATOR ANNUAL REPORT

THIS REPORT IS FOR THE YEAR ENDING DEC. 31, 19

PART B: FACILITY ANNUAL REPORT

THIS REPORT FOR YEAR ENDING DEC. 31, 19

PART C: UNMANIFESTED WASTE REPORT

THIS REPORT IS FOR A WASTE RECEIVED *(day, mo., & yr.)* – – 19

INSTRUCTIONS: You may have received a preprinted label attached to the front of this pamphlet; affix it in the designated space above—left. If any of the information on the label is incorrect, draw a line through it and supply the correct information in the appropriate section below. If the label is complete and correct, leave Sections II, III, and IV below blank. If you did not receive a preprinted label, complete all sections. "Installation" means a single site where hazardous waste is generated, treated, stored, or disposed of. Please refer to the specific instructions for generators or facilities before completing this form. The information requested herein is required by law *(Section 3002/3004 of the Resource Conservation and Recovery Act)*.

II. INSTALLATION'S EPA I.D. NUMBER

F 1

III. NAME OF INSTALLATION

IV. INSTALLATION MAILING ADDRESS

STREET OR P.O. BOX

3

CITY OR TOWN | ST. | ZIP CODE

4

V. LOCATION OF INSTALLATION

STREET OR ROUTE NUMBER

5

CITY OR TOWN | ST. | ZIP CODE

6

VI. INSTALLATION CONTACT

NAME *(last and first)* | PHONE NO. *(area code & no.)*

2 – –

VII. TRANSPORTATION SERVICES USED *(for Part A reports only)*

List the EPA Identification Numbers for those transporters whose services were used during the reporting year represented by this report.

VIII. COST ESTIMATES FOR FACILITIES *(for Part B reports only)*

A. COST ESTIMATE FOR FACILITY CLOSURE	B. COST ESTIMATE FOR POST CLOSURE MONITORING AND MAINTENANCE *(disposal facilities only)*
$, ,	$, ,

IX. CERTIFICATION

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

A. PRINT OR TYPE NAME

B. SIGNATURE

C. DATE SIGNED

EPA Form 8700-13 (4-80)

PAGE 1 OF ____

GSA No. 12345-XX
Form Approved OMB No. 158-R00XX

Please print or type with ELITE type *(12 characters/inch)*.

EPA

U.S. ENVIRONMENTAL PROTECTION AGENCY

FACILITY REPORT – PARTS B & C

(Collected under the authority of Section 3004 of RCRA.)

FOR OFFICIAL USE ONLY (Items 1 & 2)

1. DATE RECEIVED ☐☐-☐☐-19☐☐

2. RECEIVED BY

XVI. TYPE OF REPORT *(enter an "X")*

☐ PART B ☐ PART C

XVII. FACILITY'S EPA I.D. NO. G

XVIII. GENERATOR'S EPA I.D. NO.

XX. GENERATOR ADDRESS *(street or P.O. box, city, state, & zip code)*

XIX. GENERATOR NAME *(specify)*

XXI. WASTE IDENTIFICATION

LINE NUMBER	A. DESCRIPTION OF WASTE	B. EPA HAZARDOUS WASTE NUMBER *(see instructions)*	C. HANDLING METHOD *(enter code)*	D. AMOUNT OF WASTE	E. UNIT OF MEASURE *(enter code)*
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					

XXII. COMMENTS *(enter information by line number — see instructions)*

EPA Form 8700-13B (6-80)

PAGE ____ OF ____

BILLING CODE 6560-01-C

GENERAL INSTRUCTIONS; HAZARDOUS WASTE REPORT (EPA FORM 8700–13)

Important: Read all instructions before completing this form.

Section I—Type of Hazardous Waste Report

Part A: Generator Annual Report

For generators who ship their waste off-site to facilities which they do not own or operate: fill in the reporting year for this report (e.g., 1982).

Note.—Generators who ship hazardous waste off-site to a facility which they own or operate must complete the facility (Part B) report instead of the Part A report.

Part B: Facility Annual Report

For owners or operators of on-site or off-site facilities that treat, store, or dispose of hazardous waste; fill in the reporting year for this report (e.g., 1982).

Part C: Unmanifested Waste Report

For facility owners or operators who accept for treatment, storage, or disposal any hazardous waste from an off-site source without an accompanying manifest; fill in the date the waste was received at the facility (e.g., April 12, 1982).

Section II Through Section IV—Installation I.D. Number, Name of Installation, and Installation Mailing Address

If you received a preprinted label from EPA, attach it in the space provided and leave Sections II through IV blank. If there is an error or omission on the label, cross out the incorrect information and fill in the appropriate item(s). If you did not receive a preprinted label, complete Section II through Section IV.

Section V—Location of Installation

If your installation location address is different than the mailing address, enter the location address of your installation.

Section VI—Installation Contact

Enter the name (last and first) and telephone number of the person whom may be contacted regarding information contained in this report.

Section VII—Transportation Services Used (for Part A Reports Only)

List the EPA Identification Number for each transporter whose services you used during the reporting year.

Section VIII—Cost Estimates for Facilities (for Part B Reports Only)

A. Enter the most recent cost estimate for facility closure in dollars. See Subpart H of 40 CFR parts 264 or 265 for more detail.

B. For disposal facilities only, enter the most recent cost estimate for post closure monitoring and maintenance. See Subpart H of 40 CFR Parts 264 or 265 for more detail.

Section IX—Certification

The generarator or his authorized representative (Part A reports) or the owner or operator of the facility or his authorized representative (Parts B and C reports) must sign and date the certification where indicated. The printed or typed name of the person signing the report must also be included where indicated.

Note.—Since more than one page is required for each report, enter the page number of each sheet in the lower right corner as well as the total number of pages.

Facility Annual Report—Part B Instructions (EPA Form 8700–13B)

Facility Annual Report for owners or operators of on-site or off-site facilities that treat, store, or dispose of hazardous waste.

Note.—Generators who ship hazardous waste off-site to a facility they own or operate must complete this Part B report instead of the Generator (Part A) Annual Report.

Important: Read all instructions before completing this form.

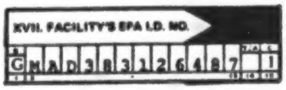
Section XVI—Type of Report

Put an "X" in the box marked Part B.

Section XVII—Facility's EPA Identification Number

Enter the EPA identification number for your facility.

Example:



XVII. FACILITY'S EPA I.D. NO.

G	M	A	D	3	8	3	1	2	6	4	8	7		1

GENERATOR'S EPA IDENTIFICATION NUMBER

Section XVIII—Generator's EPA Identification Number

Enter the EPA identification number of the generator of the waste described under Section XXI which was received by your facility during the reporting year. A separate sheet must be used for each generator. If the waste came from a foreign generator, enter the EPA identification number of the importer in this section and enter the name and address of the foreign generator in Section XXII, Comments. If the waste was generated and treated, stored, or disposed of at the same installation, leave this section blank.

Section XIX—Generator's Name

Enter the name of the generator corresponding to the generator's EPA identification number in Seciton XVIII.

If the waste was generated and treated, stored, or disposed of at the same installation, enter "ON-SITE".

If the waste came from a foreign generator, enter the name of the importer corresponding to the EPA identification number in Section XVIII.

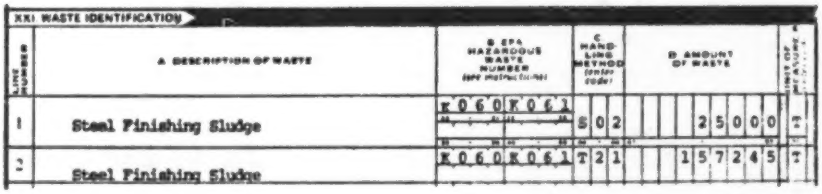
Section XX—Generator's Address

Enter the address of the generator corresponding to the generator's EPA identification number in Section XVIII. If the waste was generated and treated, stored, or disposed of at the same installation, leave this section blank. If the waste came from a foreign generator, enter the address of the importer corresponding to the EPA identification number in Section XVIII

Section XXI—Waste Identification

All information in this section must be entered by line number. A separate line entry is required for each different waste or mixture of wastes that your facility received during the reporting year. The handling code applicable to that waste at the end of the reporting year should be reported. If a different handling code applies to portions of the same waste, (e.g., part of the waste is stored while the remainder was "chemically fixed" during the year), use a separate line entry for each portion.

Example:



XXI. WASTE IDENTIFICATION

Line Number	A. Description of Waste	B. EPA Hazardous Waste Number (see instructions)		C. Handling Method (enter code)	D. Amount of Waste	E. Unit of Measure
1	Steel Finishing Sludge	K060	K061	S02	25000	T
2	Steel Finishing Sludge	K060	K061	T21	157245	T

Section XXI-A—Description of Waste

For hazardous wastes that are listed under 40 CFR Part 261, Subpart D, enter the EPA listed name, abbreviated if necessary. Where mixtures of listed wastes were received, enter the description which you believe best describes the waste.

For unlisted hazardous waste identified under 40 CFR Part 261, Subpart C, enter the description which you believe best describes the waste. Include the specific manufacturing or other process generating the waste (e.g., green sludge from widget manufacturing) and if known, the chemical or generic chemical name of the waste.

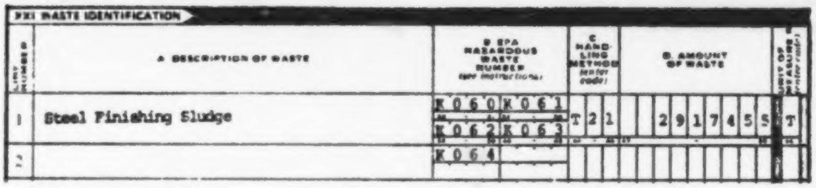
Section XXI-B—EPA Hazardous Waste Number

For listed waste, enter the four digit EPA Hazardous Waste Number from 40 CFR Part 261, Subpart D, which identifies the waste.

For a mixture of more than one listed waste, enter each of the applicable EPA Hazardous Waste Numbers.

Four spaces are provided. If more space is needed, continue on the next line(s) and leave all other information on that line blank.

Example:



XXI. WASTE IDENTIFICATION

LINE NUMBER	A. DESCRIPTION OF WASTE	B. EPA HAZARDOUS WASTE NUMBER (see instructions)	C. HANDLING METHOD (enter code)	D. AMOUNT OF WASTE	E. UNIT OF MEASURE (enter code)
1	Steel Finishing Sludge	K060 K061 K062 K063	T21	2917455	T
2		K064			

For unlisted hazardous wastes, enter the EPA Hazardous Waste Numbers from 40 CFR Part 261, Subpart C, applicable to the waste. If more than four spaces are required, follow the procedure described above.

Section XXI-C—Handling Code

Enter one EPA handling code for each waste line entry. Where several handling steps have occurred during the year, report only the handling code representing the waste's status at the end of the reporting year or its final disposition. EPA handling codes are given in Appendix I of this Part.

Section XXI-D—Amount of Waste

Enter the total amount of waste described on this line which you received during this reporting year.

Section XXI-E—Unit of Measure

Enter the unit of measure code for the quantity of waste described on this line. Units of measure which must be used in this report and the appropriate codes are:

Units of measure	Code
Pounds	P
Short tons (2,000 lbs)	T
Kilograms	K
Tonnes (1,000 kg)	M

Units of volume may not be used for reporting but must be converted into one of the above units of weight, taking into account the appropriate density or specify gravity of the waste.

Section XXII—Comments

This space may be used to explain or clarify any entry. If used, enter a cross-reference to the appropriate Section number.

Note.—Since more than one page is required for each report, enter the page number of each sheet in the lower right hand corner as well as the total number of pages.

Where required by 40 CFR 264 or 265, Subparts F or R, attach ground-water monitoring data to this report.

Unmanifested Waste Report—Part C Instructions (EPA Form 8700-13B)

Unmanifested Waste Report for facility owners or operators who accept for treatment, storage, or disposal any hazardous waste from an off-site source without an accompanying manifest.

Important: Read all instructions before completing this form.

For the Unmanifested Waste Report, EPA Forms 8700-13 and 8700-13B must be filled out according to the directions for the Part B Facility Annual Report except that: (1) blocks for which information is not available to the owner or operator of the reporting facility may be marked "UNKNOWN," and (2) the following special instructions apply:

Section VIII—Cost Estimates for Facilities

Do not enter closure or post-closure cost estimates.

Section XVI—Type of Report

Put an "X" in the box marked Part C.

Section XXI-A—Description of Waste

Use as many line numbers as are needed to describe the waste.

Section XXI-C—Handling Code

Enter the handling code which describes the status of the waste on the date the report is filed.

Section XXI-D—Amount of Waste

Enter the amount of waste received, rather than a total annual aggregate.

Section XXII—Comments

a. Enter the EPA Identification number, name, and address of the transporter, if known. If the transporter is not known to you, enter the name and chauffeur license number of the driver and the State and license number of the transporting vehicle which presented the waste to your facility, if known.

b. Enter an explanation of how the waste movement was presented to your facility; why you believe the waste is hazardous; and how your facility plans to manage the waste. Continue on a separate blank sheet of paper if additional space is needed.

Monitoring data

Do not attach monitoring data.

Appendix III.—*EPA interim primary drinking water standards*

Parameter	Maximum level (mg/1)
Arsenic	0.05
Barium	1.0
Cadmium	0.01
Chromium	0.05
Fluoride	1.4-2.4
Lead	0.05
Mercury	0.002
Nitrate (as N)	10
Selenium	0.01
Silver	0.05
Endrin	0.0002
Lindane	0.004
Methoxychlor	0.1
Toxaphene	0.005
2,4-D	0.1
2,4,5-TP Silver	0.01
Radium	5 pCi/1
Gross Alpha	15 pCi/1
Gross Beta	4 millirem/yr
Turbidity	1/TU
Coliform Bacteria	1/100 ml

[*Comment:* Turbidity is applicable only to surface water supplies.]

Appendix IV—Tests for Significance

As required in § 265.93(b) the owner or operator must use the Student's t-test to determine statistically significant changes in the concentration or value of an indicator parameter in periodic ground-water samples when compared to the initial background concentration or value of that indicator parameter. The comparison must consider individually each of the wells in the monitoring system. For three of the indicator parameters (specific conductance, total organic carbon, and total organic halogen) a single-tailed Student's t-test must be used to test at the 0.01 level of significance for significant increases over background. The difference test for pH must be a two-tailed Student's t-test at the overall 0.01 level of significance.

The student's t-test involves calculation of the value of a t-statistic for each comparison of the mean (average) concentration or value (based on a minimum of four replicate measurements) of an indicator parameter with its initial background concentration or value. The calculated value of the t-statistic must then be compared to the value of the t-statistic found in a table for t-test of significance at the specified level of significance. A calculated value of t which exceeds the value of t found in the table indicates a statistically significant change in the concentration or value of the indicator parameter.

Formulae for calculation of the t-statistic and tables for t-test of significance can be found in most introductory statistics texts.

Appendix V—Examples of Potentially Incompatible Waste

Many hazardous wastes, when mixed with other waste or materials at a hazardous waste facility, can produce effects which are harmful to human health and the environment, such as (1) heat or pressure, (2) fire or explosion, (3) violent reaction, (4) toxic dusts, mists, fumes, or gases, or (5) flammable fumes or gases.

Below are examples of potentially incompatible wastes, waste components, and materials, along with the harmful consequences which result from mixing materials in one group with materials in another group. The list is intended as a guide to owners or operators of treatment, storage, and disposal facilities, and to enforcement and permit granting officials, to indicate the need for special precautions when managing these potentially incompatible waste materials or components.

This list is not intended to be exhaustive. An owner or operator must, as the regulations require, adequately analyze his wastes so that he can avoid creating uncontrolled substances or reactions of the type listed below, whether they are listed below or not.

It is possible for potentially incompatible wastes to be mixed in a way that precludes a reaction (e.g., adding acid to water rather than water to acid) or that neutralizes them (e.g., a strong acid mixed with a strong base), or that controls substances produced (e.g., by generating flammable gases in a closed tank equipped so that ignition cannot occur, and burning the gases in an incinerator).

In the lists below, the mixing of a Group A material with a Group B material may have the potential consequence as noted.

Group 1–A	Group 1–B
Acetylene sludge Alkaline caustic liquids Alkaline cleaner Alkaline corrosive liquids Alkaline corrosive battery fluid Caustic wastewater Lime sludge and other corrosive alkalies Lime wastewater Lime and water Spent caustic	Acid sludge Acid and water Battery acid Chemical cleaners Electrolyte, acid Etching acid liquid or solvent Pickling liquor and other corrosive acids Spent acid Spent mixed acid Spent sulfuric acid

Potential consequences: Heat generation; violent reaction.

Group 2–A	Group 2–B
Aluminum Beryllium Calcium Lithium Magnesium Potassium Sodium Zinc powder Other reactive metals and metal hydrides	Any waste in Group 1–A or 1–B

Potential consequences: Fire or explosion; generation of flammable hydrogen gas.

Group 3–A	Group 3–B
Alcohols Water	Any concentrated waste in Groups 1–A or 1–B Calcium Lithium Metal hydrides Potassium SO_2Cl_2, $SOCl_2$, PCl_3, CH_3SiCl_3 Other water-reactive waste

Potential consequences: Fire, explosion, or heat generation; generation of flammable or toxic gases.

Group 4–A	Group 4–B
Alcohols Aldehydes Halogenated hydrocarbons Nitrated hydrocarbons Unsaturated hydrocarbons Other reactive organic compounds and solvents	Concentrated Group 1–A or 1–B wastes Group 2–A wastes

Potential consequences: Fire, explosion, or violent reaction.

Group 5–A	Group 5–B
Spent cyanide and sulfide solutions	Group 1–B wastes

Potential consequences: Generation of toxic hydrogen cyanide or hydrogen sulfide gas.

Group 6–A	Group 6–B
Chlorates Chlorine Chlorites Chromic acid Hyphochlorites Nitrates Nitric acid, fuming Perchlorates Permanganates Peroxides Other strong oxidizers	Acetic acid and other organic acids Concentrated mineral acides Group 2–A wastes Group 4–A wastes Other flammable and combustible wastes

Potential consequences: Fire, explosion, or violent reaction.

Source: "Law, Regulations, and Guidelines for Handling of Hazardous Waste." California Department of Health, February 1975.

[FR Doc. 80-14300 Filed 5-16-80; 8:45 am]

BILLING CODE 6560-01-M

TAB L
SAFE DRINKING WATER

TAB L
SAFE DRINKING WATER

federal register

Tuesday
June 24, 1980

Part II

Environmental Protection Agency

Water Programs; Consolidated Permit Regulations and Technical Criteria and Standards; State Underground Injection Control Programs

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 146

[FRL 1482-1]

Water Programs; Consolidated Permit Regulations and Technical Criteria and Standards; State Underground Injection Control Programs

AGENCY: Environmental Protection Agency.

ACTION: Final Rule for Part 146 and Amendments to Part 122.

SUMMARY: The Safe Drinking Water Act requires the Environmental Protection Agency (EPA) to develop minimum requirements for State programs to protect underground drinking water sources from endangerment by the subsurface emplacement of fluids through well injection. Such regulations have been established in the recently published Consolidated Permit regulations. The regulations promulgated here today establish the technical criteria and standards for use by States and EPA in the development and implementation of such State UIC programs. Neither these regulations nor the Consolidated Permit regulations establish requirements for owners or operators of injection wells at this time, with one exception. They establish requirements for State or EPA officials to be used in developing State UIC programs which, when they become effective, will in turn establish enforceable requirements for owners or operators of injection wells.

The one exception concerns owners or operators of wells which inject hazardous waste within the meaning of the Resource Conservation and Recovery Act (RCRA). Owners or operators of such wells must achieve interim status under the Hazardous Waste Management program, even though such injection practices will ultimately be controlled under the Safe Drinking Water Act once a State UIC program becomes effective.

Subpart A of these regulations spells out certain general provisions with respect to underground sources of drinking water, the classification of injection wells, the use of the area of review concept, corrective action requirements, mechanical integrity, criteria for establishing permitting priorities, and requirements for the abandonment of Class I, II and III wells. Subparts B through F of these regulations establish technical requirements and criteria that the Director is to apply in regulating the construction, operation, monitoring and reporting of wells in Classes I through V. In the case of wells in Classes I through III, Subparts B through D also detail the information that the Director is to consider prior to the issuance of a permit.

During the final drafting of these Part 146 regulations, it became apparent that some changes to the Consolidated Permit Regulations were necessary. Six amendments involving four sections are included in this publication and are discussed in this preamble.

DATES: The regulations in this promulgation shall become effective on July 18, 1980 or thirty (30) days after their publication in the **Federal Register** (July 24, 1980), whichever is later. That date shall also be the implementation date for those portions of 40 CFR Parts 122, 123 and 124 which relate to Underground Injection Control (UIC) permits and programs (see 45 FR 33290).

The Safe Drinking Water Act allows States 270 days from the effective date of these regulations to develop programs which meet the regulatory requirements of 40 CFR Parts 122, 123, 124 and 146, and to submit such programs to EPA for approval. This period may be extended by another 270 days for good cause.

In order to assist EPA to correct typographical errors, incorrect cross-references, and similar technical errors, comments of a technical and non-substantive nature on the final regulations may be submitted until July 24, 1980. The effective date will not be delayed by consideration of such comments.

ADDRESSES: Comments of a technical and non-substantive nature should be addressed to, Thomas Belk, Chief, Ground Water Protection Branch, EPA, Office of Drinking Water (WH-550), Washington, D.C. 20460 (202) 426-3985.

FOR FURTHER INFORMATION CONTACT: Thomas Belk, Chief, Ground Water Protection Branch, Environmental Protection Agency, (202) 426-3985.

SUPPLEMENTARY INFORMATION:

Legal Authority

General

These regulations are being proposed under the authority of the Safe Drinking Water Act (the "Act" or "SDWA"), Pub. L. 93-523, December 16, 1974, as amended by Pub. L. 95-190, November 16, 1977. The Act is designed to protect the quality of drinking water in the United States.

Part A of the Act (section 1401) contains definitions. Part B (sections 1411-1416) addresses the quality of water provided by public water supplies. EPA regulations implementing Part B of the Act are codified at 40 CFR Parts 141 and 142.

The regulations below relate to Part C of the Act (sections 1421-1424), entitled "Protection of Underground Sources of Drinking Water."

Basis for Concern

The legislative history of the Act reflects the basic Congressional concerns in enacting part C of the Act:

> " * * * underground injection of contaminants is clearly an increasing problem. Municipalities are increasingly engaging in underground injection of sewage, sludge, and other wastes. Industries are injecting chemicals, by-products, and wastes. Energy production companies are using injection techniques to increase production and dispose of unwanted brines brought to the surface during production. Even government agencies, including the military, are getting rid of difficult to manage waste problems by underground disposal methods. Part C is intended to deal with all the foregoing situations insofar as they may endanger underground drinking water sources." (HR Report No. 93-1185, July 10, 1974, p. 29).

The potentially dangerous practices which Congress sought to control in 1974 continue at an ever increasing rate. EPA estimates that there are in excess of 400,000 municipal, industrial, commercial, agricultural, and domestic wells currently injecting fluids below the surface, and that there are at least 5,000 new wells of these types each year. The purpose of Part C of the Act, and of the Underground Injection Control (UIC) program, is to establish a Federal-State system of controls which will insure that such underground injection practices do not endanger drinking water sources.

Relevant Statutory Provisions

A detailed discussion of the relevant statutory provisions and legislative history appears in earlier proposals of these regulations (41 FR 36730 et seq., August 31, 1976 and 44 FR 23738 et seq., April 20, 1979). Those details need not be repeated here, but it is useful to summarize the basic scheme of Part C of the Act.

1. *Section 1421: Minimum Requirements for State Programs*—Section 1421 requires EPA to propose and promulgate regulations specifying "minimum requirements" for State programs to prevent underground injections which endanger drinking water sources. Such minimum requirements must provide for at least the following:

- A program prohibiting any underground injection which is not authorized by a State permit. EPA may, at its discretion, however, allow some or all underground injections to be authorized by rules without case-by-case permits (section 1421(b)(1)(A)).

- Protection of underground drinking water sources.
- Inspection, monitoring, record keeping, and reporting requirements (section 1421(b)(1)(C)).
- Coverage of underground injections by Federal Agencies and underground injections by any person on property owned or leased by the United States (section 1421(b)(1)(D)).

2. *Section 1422(a): List of States*—Section 1422(a) requires EPA to list in the **Federal Register** each State for which an underground injection control program "may be necessary" to ensure that underground injections will not endanger drinking water sources. With the recent listing of the remaining 16 jurisdictions (45 FR 17632), EPA has now listed all 50 States, the District of Columbia, and the Territories and Possessions of the United States (hereafter "States"). Such listings are hereby confirmed.

One major consideration in listing all of the States and other jurisdictions as needing UIC programs is that in the next few years the Agency will embark on a broad effort to protect ground water throughout the United States. EPA wishes to avoid instances where the surface disposal of hazardous wastes is controlled or prohibited under the Hazardous Waste Management (HWM) program mandated by the Resource Conservation and Recovery Act (RCRA), Pub. L. 94-580, October 21, 1976, while the underground injection of the same hazardous waste is not regulated by effective State programs. EPA is concerned that such a situation would create undesirable incentives to avoid regulations under the Hazardous Waste Management program by disposing of those regulated wastes below the surface. By listing all the States the Agency intends to bring the disposal of hazardous waste through well injection under regulatory control in a comparable time period with the control of surface disposal of hazardous waste under the Resource Conservation and Recovery Act.

3. *Section 1422(b)(d): Development of Underground Injection Control Programs*—Once EPA has promulgated the "minimum requirements" regulations, each State will have the opportunity to develop an enforceable underground injection control program. The UIC program must be adopted after reasonable notice and public hearings, and must comply with the minimum requirements.

Each State will have 270 days from the effective date of these regulations to develop its UIC program and submit it to EPA for review. EPA may, for a good cause, extend this deadline for any State by up to an additional 270 days. The Agency does not intend to follow a liberal policy in granting extensions. "Good cause" will be limited to the need to obtain legal authority from the legislature and similar reasons.

If EPA determines that a State UIC program meets the minimum requirements of Parts 123 and 146, EPA will approve the program. The State will then be deemed to have "primary enforcement responsibility" under Part C of the Act and there will be no Federal UIC enforcement actions in that State so long as the State continues to meet its responsibilities.

If a State fails to adopt and submit a UIC program in a timely fashion, or if EPA finds that a State's UIC program fails in part or in whole to meet the minimum requirements of Parts 123 and 146, EPA is required to propose and promulgate UIC regulations to be effective in that State. In such an event, a State will not be deemed to have "primary enforcement responsibility," ("primacy") and direct Federal enforcement of the UIC program will result (section 1422 (b), (c), 1423). In addition, a State which fails to achieve full primacy within 2 years of the award of its first UIC grant loses eligibility for further Federal grants.

4. *The 1977 Amendments*—Although they do not vary the operating scheme of Part C of the Act, the 1977 amendments to the Act, Pub. L. 95-190, should be noted. In addition to allowing the 270 day extension for State submission of requests for approval of State programs (see above), they emphasize that States have jurisdiction over injection by Federal Agencies or on Federal lands within the State. Federal Agencies fall under State regulations as would any other "person" (section 1447(a)). With respect to injection wells on Indian lands, however, jurisdiction remains with EPA (section 1447(a)).

New Section 1421(b)(3) instructs EPA to allow consideration of varying geologic, hydrologic, and historic conditions among States. The Section further cautions EPA against fashioning minimum requirements regulations which would "unnecessarily disrupt" existing State underground injection control programs now being enforced. These considerations however, may not be used to compromise the overall statutory requirement to prevent endangerment to underground sources of drinking water (section 1421(b)(3)(c)). EPA believes that these regulations amply serve these interests: the regulations offer States discretion to tailor local programs to meet specific needs and to consider geologic, hydrologic, and historic conditions in fashioning rules and permit requirements.

History of Rule Making

EPA originally proposed regulations to implement Part C of the Safe Drinking Water Act on August 31, 1976 (41 FR 36730-45). That proposal included the program regulations, the technical criteria and standards, and the related grant regulations. Four hundred twenty nine (429) written sets of comments were filed and many persons commented at public hearings in Dallas, Denver, and Washington, D.C.

After careful review of those public comments, EPA determined that there were many ways that the initial proposal could be made generally more flexible and less burdensome without sacrificing the resulting environmental protection to any significant degree. Further, in the fall of 1978, the Agency decided to consolidate the regulations for its major permit programs: the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA); the UIC program under the Safe Drinking Water Act (SDWA); and the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act (CWA).

As a consequence of these events, the Agency took the following series of actions in 1978 and 1979. The grant regulations related to the UIC program were promulgated in final form on October 12, 1978 (43 FR 47130, *et seq.*). The initial group of 22 States needing an UIC program were listed on September 25, 1978 (43 FR 43420). In addition the UIC program regulations were reproposed in four parts on April 20 and June 14, 1979:

- 40 CFR Part 122 reproposed the regulatory framework for the UIC program.
- 40 CFR Part 123 described the elements of an approvable State program and proposed the process for EPA approval of State participation in the UIC program.
- 40 CFR Part 124 described the procedures for permit application and issuance which EPA intends to follow when it has primacy. Certain provisions of 40 CFR Part 124 would also be applicable to State UIC programs.
- 40 CFR Part 146 (being promulgated here) proposed the technical criteria and standards to be used by EPA or the State in implementing the UIC program.

Numerous written comments were received and five public hearings were held in Dallas, Washington, D.C., Chicago, Seattle, and Denver on the

Consolidated Permit regulations and Part 146. The preamble to the Consolidated Permit regulations responds to both the written and oral comments addressed to Parts 122, 123, and 124. Two hundred sets of written comments were received addressed to Part 146. These together with the oral comments received will be responded to in this preamble.

As noted in the preamble to the reproposed Part 146 (44 FR 23742), an effort has been made in the process of promulgating these regulations to reduce duplication by retaining only technical criteria and standards in Part 146 and transferring all programmatic requirements to Parts 122, 123 and 124.

It is not necessary to repeat here the requirements established and explained in the Consolidated Permit regulations. The reader is referred to 45 FR 33290. It is, however, important to emphasize that, in contrast to the 1979 proposal, the final Part 122 regulation requires owners or operators of wells used to inject hazardous waste to achieve interim status under RCRA until the controlling State UIC program becomes effective. Therefore, the totality of requirements applicable to State UIC programs are to be found in six sets of regulations.

- The UIC program grant regulations (43 FR 47130).
- 40 CFR Part 122 (45 FR 33418).
- 40 CFR Part 123 (45 FR 33456).
- 40 CFR Part 124 (45 FR 33484).
- 40 CFR Part 146 (Published here today).
- 40 CFR Part 265 (45 FR 33260).

Response to Comments

The preamble to the 1979 reproposal of Part 146 requested comments from the public in more than 20 instances. Additional comments were requested in the preamble to the Consolidated Permit regulations as well. Even though the programmatic requirements for the Underground Injection Control program are properly dealt with in the preamble to the Consolidated Permit regulations, it is desirable to discuss them at least in part here since the technical criteria and standards are an integral portion of the Underground Injection Control program. In addition, it is appropriate to err on the side of completeness, even at the risk of repetition, for the sake of a comprehensible discussion of the issues involved.

I. Regulatory Framework

A. Coverage of the Regulations—1. *Wells not near underground sources of drinking water.* In the preamble to the 1979 reproposal of Part 146, EPA explained that, at one point in developing these regulations, EPA considered not applying these regulations to wells that do not inject into, through, or above drinking water sources (44 FR 23740–1). The preamble went on to explain the Agency's concern that such a provision could leave an injector uncertain about whether he is or is not covered by these regulations. Furthermore, although a particular well may not be injected into, through or above a drinking water source, it could still be a potential cause of endangerment by displacing formation fluids, through a hydraulic connection, into an underground source of drinking water.

In view of these concerns, the proposal suggested applying the regulations to all injection wells regardless of their location. The preamble went on to note that one result of this decision was that off-shore injection operations would be subjected to UIC regulations. In response, a number of commenters urged that off-shore operations be excluded from the coverage of the UIC program and that wells that do not inject into, through or above a drinking water source should be given recognition in some form. EPA agrees and the final Part 122 includes two sections intended to resolve this question.

First, § 122.31(d)(2)(i) excludes injection wells located on a drilling platform or other site beyond a State's territorial waters. The rationale behind this decision is that the Safe Drinking Water Act intended the underground injection control program to be a State program. Therefore, only injection wells that fall within the boundaries of a State are included and off-shore wells which fall beyond State boundaries are excluded.

Second, a new § 122.43(a) has been added. This section states that if a well does not inject into, through or above a drinking water source, the Director has discretion to ease the area of review, construction, mechanical integrity, monitoring, operating and reporting requirements applicable to such wells. In this regard EPA contemplated excluding such wells entirely from these regulations. However, it is only prudent that as long as an injection facility has some potential to contaminate underground sources of drinking water through lateral displacement, some minimal control should be exercised over it. At a minimum, the Director should have the opportunity to assess the potential for contamination. Thus, wells that do not inject into, through or above underground source of drinking water are still covered by the UIC program, so that they can be inventoried and their potential for endangerment reviewed. However, discretion is given to the Director to determine whether any additional requirements need be applied in particular instances.

2. *The Inclusion of Class II Wells.* The overwhelming majority of people commenting on the regulations on behalf of the oil and gas industry and the State regulatory agencies suggested that EPA should not bring Class II wells (those injection wells associated with the oil and gas industry) under the UIC regulations. Commenters advanced three reasons in support of this suggestion. First of all, they contended that EPA has failed to prove extensive damage to underground sources of drinking water from Class II injection practices. Second, the commenters maintained that existing State programs have done an effective job of preventing the contamination of underground sources of drinking water through Class II practices. Third, the commenters pointed out that Section 1422(c) of the SDWA instructs EPA not to include any requirements in its UIC regulations which interfere with or impede the disposal of brine or other fluids which are brought to the surface in connection with oil or natural gas production, or any underground injection for the secondary or tertiary recovery of oil or natural gas, unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

A number of commenters also argued that natural gas storage facilities should be excluded from the regulations for reasons similar to the ones cited above, and because natural gas is neither a fluid nor a contaminant within the meaning of the SDWA.

EPA has carefully reviewed these comments and concludes that injection wells involved in natural gas storage operations do constitute underground injection within the meaning of the Act, and should be subject to these regulations. Section 1421(b)(1)(A) of the SDWA states that a State program, in order to be approved under Section 1422:

> "* * * shall prohibit, effective three years after the date of the enactment of this Title any underground injection in such State which is not authorized by a permit issued by the State to authorize underground injection by rule);"

The term "underground injection" is defined in Section 1421(d) of the Act as the subsurface emplacement of fluids by well injection. In scientific usage, the term "fluids" is defined to include not only liquids that flow but also gases. Thus, reading these two provisions of the Act together, there seems to be little question that EPA does have the authority to bring both natural gas storage wells and other injection wells related to oil and gas production under the control of the Act. A more precise statement of the issue then would seem to be the appropriate level of regulation to which such practices should be subjected.

After a careful review of the comments on this point, the Agency has decided that further easing of the requirements for gas storage wells is appropriate for several reasons. First, EPA agrees with the comments that pointed out that unlike the injection of other substances, gas is highly unlikely to result in the chemical contamination of drinking water, even if it migrates from the injection zone. Second, the Agency is persuaded by the arguments that these facilities are used to store a valuable commodity and that, therefore, the operator has a strong incentive to be able to recover the stored gas with minimal losses to the environment.

However, after a further review of the pathways of possible contamination, the Agency has concluded that the major concern is any possible contamination of underground sources of drinking water from the displacement of formation fluids when gas is stored in aquifers.

The Agency's final decision is to classify gas storage operations in Class V. As such they will be authorized by rule in satisfaction of the requirement in Section 1421(b)(1)(A) of the Act, and be subject to further study. If States, based on their assessment, recommend further regulatory controls for gas storage wells, appropriate requirements may be established in the future.

With regard to the argument concerning existing effective State programs, the Act does not set any procedures or standards for EPA to follow in deciding which States to list. The Committee Report, on the other hand (H.R. Report 93–1185, page 32), states that it was anticipated by the Committee that EPA will list all 50 States but perhaps not the District of Columbia and various territories and possessions.

Furthermore, EPA has deliberately chosen to avoid any evaluation of the quality of existing State programs or the preparation of a "report card" as the basis for the Administrator's decision to list or not to list. There are several persuasive reasons for this course of action. First of all, a significant amount of EPA resources would be consumed in the process of doing careful evaluations of all of the 50 States UIC programs as they exist today. Such a nationwide evaluation process would require years to complete, involve hundreds of EPA personnel, and cost millions of dollars of contract support funds. Secondly, such an essentially adversary relationship could easily lead to embarrassment and resentment between States and EPA. It is not likely to be conducive to the long term objective of an effective State/Federal partnership in the implementation of UIC programs.

At one point in the development of the UIC program, it was the intention of the Agency to stagger the workload by phasing in the listing of States. It was to carry out the phasing that EPA developed the system of priorities to select the States which should be listed first. Factors to be considered in establishing such priorities included those approximating the potential threat (such as the number of wells in each State) and those approximating the importance of the ground water resources (such as the percent and absolute number of people relying on ground water). The basis for establishing priorities is given a fuller explanation in the Preamble to the initial listing of 22 States (43 FR 43420).

It should be emphasized that the Agency has always intended to list all States in keeping with the congressional guidance. The priority system discussed above was always intended as a basis for identifying the States to be listed first, not as a basis for deciding which States did or did not need a program.

In the process of consolidating the Agency's major permit program, however, it became apparent that the UIC program and the Hazardous Waste Management program are related at a number of points. The Agency, therefore, accelerated the listing of States in order to apply regulatory controls under UIC and HWM in a coordinated and orderly manner.

It is inevitable that the establishment of a Federal program necessarily carries with it certain uniform monitoring, reporting and other administrative requirements. This, however, is not to say that the Agency has made the judgment that all currently existing State programs would have to change radically in order to achieve EPA approval for delegation. Indeed, mindful of the instructions of the SWDA to minimize the disruption of existing effective State programs, EPA has gone to some lengths to avoid any requirement which would force any State to seek new legislation or to seek changes in existing regulations. While it is clear that there are variations in existing State programs to control underground injection, and that these regulations will have the effect of upgrading some of the State programs, it is EPA's expectation that many if not most State programs will be able to win EPA approval with only minimal changes. The Agency looks forward to working with State staffs to develop approvable programs as expeditiously as possible.

The House Committee Report also spoke to the congressional intent in adopting the amendments instructing EPA not to set requirements which would interfere with or impede oil and gas production (H.R. Report #93–1185, p. 31):

> "This amendment prohibits regulations for State UIC programs from prescribing requirements which would interfere with production of oil or natural gas or disposal of by-products associated with such production, except that such requirements are authorized to be prescribed if essential to assure that underground sources of drinking water will not be endangered by such activity.
>
> The Committee's intent in adopting this amendment was not to require EPA to bear an impossible burden of proof as a condition of promulgation of any such regulation. Rather, the Committee sought to assure that constraints on energy production activities would be kept as limited in scope as possible while still assuring the safety of present and potential sources of drinking water. Similar provisions were adopted with respect to EPA regulations which are to be promulgated when a State fails to adopt an approvable underground injection control program.
>
> In deciding what is an "essential" requirement, the Committee intends that the types of measures referred to in the Administrator's Decision Statement Number 5 and those referred to in this report be considered to be "essential" unless the contrary could be demonstrated with respect to a specific well or injection. Moreover, in using the works "interfere with or impede" the Committee did not intend to include every regulatory requirement which would necessitate the expenditures of time, money, or effort. Rather, the Committee intended to refer to those requirements which could stop or substantially delay production of oil or natural gas."

Thus, while these UIC regulations may create additional requirements and impose additional economic costs on oil and gas producers, and while they may result in the closure of certain marginal wells, the Agency is not persuaded that these regulations would result in a substantial delay of oil or natural gas production in the meaning of the Congressional intent.

Finally, the Agency finds little merit in the arguments that it has failed to demonstrate the necessary for the UIC regulations because it has not cited numerous instances of damage to underground sources of drinking water. It should be noted that in the basis for concern expressed in the House Committee Report (quoted earlier in this Preamble) Congress had clearly concluded that the underground injection of contaminants is an increasing problem. Numerous instructions to the Agency in the House Report No. 93–1185 would seem to indicate that the Congress was fully aware that it was enacting a preventive statute which was aimed at preventing the contamination of the Nation's ground water resources, rather than at cleaning up after the damage had occurred. As one example of this, it is interesting to note the discussion of the definition of endangering drinking water sources (H.R. Report 93–1185, page 32):

> "The Committee was concerned that its definition of 'endangering drinking water sources' also be construed liberally * * * The definition would be met if the injected material were not completely contained within the well, if it may enter either a present or potential drinking water source, and if it (or some form into which it might be converted) may pose a threat to human health or render the water unfit for human consumption. In this connection, it is important to note that actual contamination of drinking water is not a prerequisite either for the establishment of the regulations or for the enforcement thereof."

Furthermore, the Agency is mindful of the fact that Section 1421(b)(1)(A) of the SDWA specifies that once a State UIC program becomes established all underground injection is considered unlawful unless authorized by the State's UIC program.

Thus, the Agency did not conduct field work to document a national file of every case of contamination by a Class II injection practice. Nor did it try to establish the percentage of the Nation's ground water which has been contaminated by specific types of injection well practices. The Agency does acknowledge a responsibility, however, not to regulate needlessly or to force the expenditure of national rersources for frivolous purposes. Therefore, the Agency did review court cases and other available material to establish that the injection practices in Class II and the other classes do have a potential for contaminating underground sources of drinking water. We believe that documenting the potential for contamination does satisfy the legal standard imposed upon the Agency by the SDWA.

B. *Test of Endangerment.* The definition of the term "endangerment" has been one of the more commented upon sections of the UIC regulations. The original 1976 proposal of the UIC regulaltions followed the language of the SDWA. Section 1421(d)(2) of the Act states:

> "Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons."

The term "contaminant" is defined in section 1401(6) as "any physical, chemical, biological or radiological substance or matter in water."

The 1976 proposal, therefore, offered the following definition:

> "Underground injection endangers underground drinking water sources if (1) such injection may make it necessary for a public water system using an underground drinking water source to increase treatment of the water, or (2) if such injection might make it necessary for a public water system which uses the source in the future to use more extensive treatment of the water than would otherwise have been necessary, or (3) if such injection may otherwise adversely affect the health of persons such as by adding a substance that would make water from the source unfit for human consumption." (Section 146.1 (x), 41 FR 36737).

Numerous adverse comments were received on this suggested definition. Many believed the definition to be confusing and vague, especially the third element relating to adverse effects on the health of persons. Other commenters held that EPA had simply restated the law in different words, and that the regulations should either use the statutory definition or one that could be applied with operational precision.

In response, the 1979 reproposal avoided a formal definition of "endangerment." Rather, it attempted an operational test that could be used with some operational significance. As the Preamble discussion pointed out (44 FR 23740):

> "The test in these reproposed regulations is whether injection operations will cause the migration of injected or formation fluids into an underground source of drinking water. If injection into a well can cause such migration, the owner/operator must take appropriate action to eliminate the fluid migration."

The "no migration" standard was applicable to wells in Classes I–III, which were to achieve it through the use of sound engineering practices. The proposed ban/phase out for Class IV wells was also consistent with this standard. Since no technological requirements could ensure the absence of migration from wells designed to inject into or above USDWs, this practice was to be discontinued.

The proposal recognized two exceptions to the standard. One was in the case of Class V wells. EPA had determined (and still believes) that too little is known about the practices grouped in this class to make them ripe for regulatory controls. At the same time, the Agency did want to emphasize the responsibility of the Director to take action in cases where Class V wells did pose a real problem.

The Agency believed that a more selective standard than "no migration" was appropriate to define such situations because many Class V wells, even beneficial practices such as aquifer recharge wells, are designed to inject into potential USDWs. As a consequence, § 146.53 (44 FR 23766) required the Director to act when he gained "knowledge of a Class V well which presents a significant risk to the health of persons * * *"

The other exception appeared in § 146.22(c) (33 FR 23762) which gave the Director discretion to relieve Class II wells in existing injection fields of the applicable casing and cementing requirements. One condition of granting relief was that the well injection "will not result in the migration of fluids into an underground source of drinking water so as to create a significant risk to the health of persons using the source of drinking water." This formulation was chosen because the Agency wanted to recognize the special nature of construction requirements for wells in existing injection fields. While the Agency did not believe it appropriate to grant an unconditional license to endanger USDWs, it did believe it appropriate to allow additional scope in this instance in keeping with the proviso of the SDWA to avoid interfering with or impeding oil or gas production.

Commenters agreed that the proposed scheme was less vague than the earlier definition. However, several commenters now argued that the definition was too broad and that the term "migration" must be restricted in some fashion. Others were concerned because the definition seems to include displacement through underground hydraulic connections and argued that such migration was hard to anticipate, monitor, and, in some cases, control. Some commenters suggested that the term "migration" should be modified to some term such as "harmful migration", or "migration in harmful quantities." Others urged the use of such terms as "detectable migration" or suggested the use of ambient water quality standards broader than the parameters controlled in the National Interim Primary Drinking Water Standards. Still others questioned the appropriateness of departing from the language of section 1421(d)(2) to establish less restrictive standards for

Class V and the casing and cementing requirement in Class II.

EPA appreciates these suggestions but does not believe that they would improve the usefulness of the test. The use of a broader set of water quality standards or such modifiers as "harmful" would reintroduce the unworkability of the definition that was offered in the original proposal. The use of the term "detectable" would be redundant because, by definition, a migration into underground sources of drinking water could only be ascertained if it can be measured or detected. Finally, the lateral displacement of formation fluids is one of the pathways of contamination of concern in these regulations and EPA fully intended to bring it within the scope of this definition.

Consequently, the final regulations retain the "no migration" standard for Classes I–III, although it is now stated as "movement of fluids" or "movement of injection or formation fluids." (40 CFR 122.34). The Agency intends no substantive change through the substitution of "movement" for "migration." The two terms are considered synonymous and are used interchangeably in these regulations. The Agency does not believe that it is an overly protective standard. It does not require total containment; only that any leak or displacement not reach any USDW. It has the merit of being measurable and can be achieved through the use of readily available engineering technology which many injectors already apply.

Similarly, the "significant risk" standard has been retained in § 146.22(c). The Agency still believes that this is an appropriate condition for granting relief from the Class II casing and cementing requirements.

The Agency has decided to review the ban/phase out for some Class IV wells, while retaining this approach for those injecting into USDWs. The applicable standard is one of the questions in the further consideration of certain Class IV requirements. This subject is discussed more fully below.

In the case of Class V wells, the Agency has decided to establish a standard more closely in conformance with the statutory language. 40 CFR 122.34 (c) and (d) now require the Director to act if he learns that a Class V well "may cause a violation of primary drinking water regulations" or "may be otherwise adversely affecting the health of persons." These are not deemed to be more stringent or more inclusive standards. The Agency has not reconsidered its judgment that Class V wells are not ripe for regulatory controls, and enforcemnt action by the Director is not expected to become the rule rather than the exception it was intended to be under the Class V regulatory scheme. The Agency has decided that the use of statutory language is more appropriate in this case than a standard based on "significant risk."

The explicit authority to apply permits to Class V wells is new. Again, this is not intended to make the Class V requirements more stringent. The Agency, however, realized that the reproposed regulations had failed to provide the Director with any mechanism for applying controls in the cases where action needs to be taken with regard to a Class V injector to apply for a permit is intended to remedy this oversight.

C. Aquifer Restoration vs. Protective Action. A number of commenters urged the Agency to establish explicit requirements in the regulations that would force owners or operators of wells to take action to restore the quality of an aquifer under appropriate circumstances. The Agency has carefully considered these suggestions and has chosen not to establish explicit requirements for the following reasons.

Aquifer restoration has been tried on a pilot scale in shallow aquifers in connection with certain solution mining operations. Our review of the outcome of these pilot projects persuaded the Agency that full scale attempts at aquifer restoration could be very expensive with uncertain outcomes. Certainly in cases where solution mining is accompanied by an expected subsidence or catastrophic collapse in the overlying strata, the potential benefits of an aquifer resoration attempt are questionable.

The Agency also hesitates to impose restoration requirements because it interprets the mandate of the SDWA to be a preventive one. We believe that the main thrust of these regulations should be the prevention of further contamination rather than the restoration of aquifers that may already be damaged. The Agency is very much concerned that such requirements may divert scarce resources, both Federal and State, from the task of controlling underground injection which is the mandate under the Act.

At the same time it is not the intention of these regulations to preclude the Director from requiring the restoration of aquifers if such action is appropriate in particular cases. In establishing their UIC programs, the States are free to set more stringent requirements than the minimum requirements in these regulations. In addition, new § 146.10(d) requires the owner or operator of a Class III well to submit a plan of abandonment which must demonstrate that no migration from the mining zone into underground sources of drinking water will occur after abandonment. In setting abandonment requirements, the Director is given the discretion to set such aquifer clean up and monitoring requirements as he deems necessary to insure that the abandonment plan will be effective. The Agency will continue to assess the development of technology in this area and may establish additional appropriate requirements in the future.

D. Performance Standards vs. Technical Requirements. Many commenters criticized EPA for over-regulating by attempting to set technical requirements. They urged that EPA establish the objectives that it wants to achieve and allow discretion to the State Director and the injector in achieving those objectives. At the same time, many of the requirements were critized as being too vague and allowing too much undirected discretion to the permitting authority. Such commenters urged EPA to specify more clearly precisely what the standards are.

As these conflicting comments demonstrate, the tension between performance standards and technical requirements is an inherent problem in attempting to write national regulations in a highly technical area. Supporters of performance standards argued that they are an efficient means of regulating because they allow the owner or operator to choose how he will come into compliance. This, it is argued, tends to foster the development of new technology rather than stifling it and allows the most efficient means of coming into compliance to be applied in a particular instance.

Supporters of technical requirements argue that performance standards become almost impossible to enforce. Determining compliance or lack of compliance with the objectives of the regulations becomes a matter of long, drawn-out, highly technical arguments among technical experts. Further, it is argued that both in fairness to the regulated community, and in order to make the regulations enforceable, the regulations have a responsibility to spell out clear-cut requirements that the owner or operator understands and against which compliance or the lack of it can be measured.

Precisely because a great deal is still unknown about the movement of fluids below the surface, and because the monitoring of interactions is both difficult and uncertain, the approach of the UIC regulations has been to translate the mandate of the SDWA into straight forward "good engineering" practices such as mechanical integrity of the tubular goods and the absence of man-made communication between the injection zone and higher strata. The presumption of the regulations is that as long as an owner or operator is in compliance with the technical requirements of "good engineering" practices, endangerment of nearby underground sources of drinking water will have been avoided. In cases where migration into underground sources of drinking water still occurs, even though the technical requirements have been complied with, the Director may impose additional requirements. In general, discretion in these regulations has been allowed where it seemed appropriate and possible to do so. On balance, this still seems the best approach to the Agency and it has been retained in the regulations.

E. Permitting Sequence. Many commenters pointed out an inconsistency between proposed 40 CFR Part 122 and 40 CFR Part 146 with respect to just when in the life cycle of a well a permit had to be obtained. A more important point of confusion was that the regulations seemed to require that the Director, prior to issuing the permit, review certain information which, at least in some cases, could not be produced without injecting into the well, even though the regulations seemed to prohibit injection without a permit.

The Agency agrees that the proposed regulations were not clear on this point and has now clarified the permitting sequence. The regulations now make clear that the requirement is for a single multi-phase permit similar to the current practice in a number of States, e.g., Michigan. In the case of a new well, the owner or operator must apply for a permit, which may be issued to him after appropriate public comment and hearings, before any work to drill or convert a well begins (see 40 CFR 122.33 and 122.38(b)). The permit is to have three phases: construction, testing and stimulation; operation; and abandonment. The applicant's plans for the construction and preparation of the well, as approved by the Director, will be incorporated into the permit as permit conditions. Should the plans change in any material way, the permittee must notify the Director and obtain his concurrence to the changes. Such modifications are considered to be minor modifications and can be approved administratively without the requirement for public hearing and comment.

It is the responsibility of the owner or operator to notify the Director of the completion of each phase and to obtain the Director's written or oral permission to proceed with the next phase (see 40 CFR 122.41(c), 122.42 (a) and (f), and 146.10). The permittee must provide the Director a 13 day opportunity to conduct a physical inspection of the well before putting the well into operation. Conditions for the operation of the well will be established by the Director as part of his notification to the owner or operator that he may proceed with the next phase. The Sections of Part 146 specifying the information to be submitted by the applicant and to be considered by the Director have been modified to reflect this clarified scheme.

The owner or operator of an existing well must submit his application at the time he is required to do so by the Director in accordance with the Director's plan for re-issuing permits submitted as part of the State program to EPA for approval. The permit will apply to the operating and abandonment phases of the well's life, but may incorporate compliance schedules according to which the injector must perform such corrective actions as the Director may require.

The Agency believes there are several advantages to this approach, not the least of which is that it will minimize the changes required in the current procedures of most States. By placing the permitting decision at the beginning of the process, it assures the applicant of a decision before any major investment has been made. Since the approval to proceed to the next phase can be handled administratively, it avoids any major delays once the project has been initiated. Finally, it provides a greater degree of environmental protection by clarifying the authority of the Director to supervise the construction and testing of the well in addition to its operation and abandonment.

F. Coordination of Authorities Under SDWA, RCRA and CWA. One of the questions addressed in the consolidation of the Agency's major permit programs was the coordination of overlapping authorities over well injection. Section 3005 of RCRA states that once the Hazardous Waste Management program is established, hazardous waste may only be disposed of (including injected) in a site approved under the authority of RCRA. At the same time, Section 1421 of SDWA states that once a UIC program is established for a State, any well injection in the State is prohibited unless authorized under its UIC program. Since there are differences between SDWA and RCRA, these parallel statutory sections could subject the operator of an injection well used to dispose of hazardous waste to duplicative and possibly conflicting requirements. In keeping with its intention of reducing administrative burdens on the regulated community, the Agency offered the following resolution in the 1979 proposal of the Consolidated Permit regulations. The surface management of hazardous waste would be regulated under RCRA while injection wells would be regulated under the SDWA. The separation point would be at the cut-off valve at the well-head. A facility would have to obtain authorization under SDWA to operate the well itself. Any attendant surface facilities used to manage hazardous waste would have to be permitted under RCRA. The rationale for this proposed method of regulation was twofold: First, the technical differences between surface disposal techniques and well injection argue that the two sets of practices are appropriately regulated through differing technical requirements; second, the proposal avoided the imposition of duplicative procedural requirements on the operator of the well.

Three major comments were received on this proposed course of action. Two of them agreed in general with EPA's decision as long as the owner or operator of the well would have to complete the manifest-keeping requirements under RCRA. This was, of course, one of the conditions specified in proposed 40 CFR 122.44 and 40 CFR 146.09. The third commenter objected strongly arguing that: (1) The language of Section 3005(a) of RCRA does not allow the disposal of hazardous waste in any facility that is not permitted under RCRA; and (2) the disposal of hazardous waste should be regulated under RCRA because that Act provides a greater level of protection to the environment.

EPA has reviewed these comments with great care and rejects the general argument that the level of protection afforded the environment from the potential effects of underground injection would necessarily be greater under RCRA than under SDWA. While it is true that RCRA authorizes the Agency to protect human health and the environment from the impacts of hazardous waste disposal, the scope of this mandate is not directly relevant to well injection. The major concern from the injection of fluids is the potential danger to underground sources of drinking water, and the Agency believes it has adequate authority under SDWA to protect such sources from the effects of well injection. Futhermore, because of technical differences in the practices, the requirements which are appropriate to surface disposal methods are not in many cases, appropriate for well injection. Indeed, the Agency would promulgate essentially the same technical requirements to regulate the well injection of hazardous wastes whether it did so under SDWA or RCRA.

In response to comments, however, the Agency has changed its approach to coordinating RCRA and SDWA authorities in three ways. First, under SDWA no enforceable requirements will apply to operators of injection wells in a State until the UIC program for that State is effective. Because of the statutory scheme of SDWA, State programs will not be established until one to two years after the minimum requirements in 40 CFR Part 122 have been promulgated. EPA agrees that, under the proposed regulatory approach, the SDWA would, therefore, not have provided a level of control equivalent to RCRA over wells used to inject hazardous waste during the interim period. Consequently, the final 40 CFR 122.23 requires that owners or operators of Class I and IV wells obtain interim status under RCRA. Certain standards for interim status are contained in 40 CFR Part 265 Subpart R which has been made applicable to such injectors. Additional standards have been proposed (see 45 FR 33280) for future inclusion in Part 265. Injectors of hazardous waste will ultimately be regulated under the SDWA. However, prior to the time a State UIC program is effective, hazardous waste injection wells may be permitted under RCRA (see 40 CFR 122.30) for a period not to exceed two years.

Second, in contrast to the proposal, injection wells will now be authorized under both RCRA and SDWA once the applicable State UIC program becomes effective. A permit by rule under RCRA (see 40 CFR 122.26) will authorize the disposal of hazardous waste into an injection well if the well has been properly authorized under SDWA. This final resolution was adopted because it satisfies the statutory language of both Acts. At the same time, the goal of minimizing procedural burdens on the regulated community will be maintained. As a practical matter the owner or operator of a well used to inject hazardous waste will still only have to obtain authorization and comply with requirements applicable to him under the UIC program. Compliance with applicable UIC requirements will be deemed to satisfy RCRA requirements as well.

A final point concerns the delegation of interim status authority to States. States will be given the option to choose whether to assume interim control over hazardous waste injection wells under RCRA and then convert to control under SDWA. Alternatively, they may leave interim regulation of such wells with EPA and accept delegation only at the time their UIC program becomes effective. If a State chooses the former method, it will be required to assume responsibility under RCRA through the same agency that will ultimately exercise the responsibility under the SDWA.

Other changes have also been made in the regulatory scheme for Class IV wells. They are discussed later in this preamble.

Injection wells, with the exception of Class II, could also be regulated either under the Clean Water Act (CWA) or the SDWA. More specifically the CWA requires that in cases where the National Pollutants Discharge Elimination permitting system (NPDES) is delegated to States, the States must have the legal authority to also control the disposal of pollutants into injection wells. The proposed Consolidated Permit regulations in § 123.74 required State NPDES permit programs to have the authority to issue permits to control the disposal of pollutants into wells.

Such a requirement could conceivably have some undesirable results. To the extent that there are differences between the CWA and the SDWA, such a requirement could, for example, require a State to develop a UIC program which meets the requirements of the SDWA and then to develop separate authorities to control well injection that meet the requirements of the CWA. In addition, this section could be read to imply that the UIC program and the NPDES program could only be delegated in concert.

In order to resolve these difficulties, final Section 40 CFR 123.72 now requires that State law provide authority to issue the permits in question and specifies that an approved UIC program satisfies this requirement for the NPDES program.

II. Major Programs Concepts

A. Well Classification. In the proposed 40 CFR Parts 122 and 146.05, the Agency proposed a revised scheme for classifying injection wells and requested comments on its appropriateness. In general, commenters agreed that this was a workable classification system. A number of commenters, however, suggested the need for further clarification. Section 146.05 of these regulations attempts to resolve the points that were raised.

First, a number of commenters pointed out that in the case of Class I and Class IV wells, part of the definition of the well involved the relationship of the well to the nearest drinking water source, without, however, specifying any distance or other limitation. The applicable definitions now specify that Class I wells must inject below the deepest formation which, within a quarter of a mile of the well bore, contains an underground source of drinking water. Conversely, Class IV wells are those that inject into or above a stratum which, within a quarter of a mile of the well, contains an underground source of drinking water. As a basis for this clarification, the Agency relied on the concept of the area of review and conformed these definitions to the minimum of one-quarter mile to be used when the area is established by the use of a fixed radius.

Second, many commenters were concerned about sand backfill wells and the possibility that, because of the nature of the injected materials, these wells could come under the classification of hazardous wastes under Class IV. This was not the result intended by the Agency. The final regulations now specify that sand backfill wells are to be considered Class V. They are to be assessed for their environmental impact and future regulations may be applied to them.

Third, some commenters suggested that the proposed regulations left some confusion over the status of non-residential septic systems. Single-family domestic sewage disposal systems are not covered under the UIC program. Multiple dwelling and industrial sewage disposal systems are generally included in Class V. Those that are used to dispose of hazardous waste fall under Class IV.

Fourth, a number of commenters suggested that disposal wells handling blowdown water discharges from gas refinery plants and similar wastes be treated not as Class I but as Class II wells. Given the nature of these operations and the chemical compositon of the injection fluids, the Agency has decided that these operations would be more appropriately regulated under Class I.

Fifth, some commenters expressed confusion over the status of injection wells used to store fluids which are used in the recovery of stored hydrocarbons. Section 146.05 clarifies that such wells are now to be treated not as salt water disposal wells, but as Class II hydrocarbon storage wells.

Sixth, during the comment period, EPA was made aware that hazardous waste may in some cases be injected in situations other than into, through or above an USDW. Because of the definition of Class IV, these injections would, under the proposed regulations, have fallen into Class V. Commenters argued that the injection of hazardous waste merits stricter regulation than the requirements of Class V even if it is not into, through or above an USDW. The Agency agrees with this view, especially because it seeks to make the control of hazardous waste disposal under RCRA and SDWA comparable. Therefore, the injection of hazardous waste other than through Class IV wells is now included in Class I (see 40 CFR 122.32(a)).

Seventh, the proposed regulations included "nuclear" storage and disposal wells in Class I (see proposed 40 CFR 122.34, 44 FR 34282). The definition of the term "solid waste" (and therefore "hazardous waste") under RCRA may include certain kinds of radioactive waste, but specifically excludes source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended. Since the SDWA does not contain a similar limitation, the Agency proposed to include the injection of such material in Class I. Few commenters addressed this aspect of the proposal, although some objected to granting States authority over these sources. The President on February 12, 1980, issued an Executive Order outlining a program to arrive at a comprehensive radioactive waste management program. Until this program is complete, and EPA has had an opportunity for full consultations with the Nuclear Regulatory Commission, the Department of Energy, and other agencies with responsibilities potentially affecting radioactive wastes, it would be premature for EPA to issue regulations concerning the disposal of radioactive wastes into Class I wells. Moreover, EPA wishes to coordinate any regulations governing sand backfill wells with regulatory measures it may undertake under the Uranium Mill Tailings Act. Accordingly, EPA has modified the classification of wells so that wells disposing of radioactive wastes below strata containing a USDW will be Class V wells.

However, the disposal of radioactive wastes into or above USDWs is an environmentally undesirable practice. Therefore, EPA has added a definition of "radioactive waste" in § 122.3 which clarifies that the term "nuclear" waste used in the proposal was intended to cover not only the radioactive wastes which are hazardous wastes under RCRA but also fission by-products and similar wastes covered under the Atomic Energy Act of 1954. The disposal of all such wastes into or above USDWs is included in Class IV and will be regulated according to the scheme promulgated for Class IV wells: those Class IV wells injecting into a USDW are prohibited; requirements for other Class IV wells will be promulgated in the fall of this year. (See the discussion of Class IV requirements below.)

Section 122.31(d) now includes specific inclusions and exclusions from the coverage of the UIC program. Notes have also been added to § 146.05 for the convenience of the reader.

B. Underground Sources of Drinking Water. Since the original proposal of the UIC regulations in 1976, an underground source of drinking water has been defined as an aquifer or its portion which either currently provides water for human consumption or is capable of yielding water containing fewer than 10,000 mg/1 of total dissolved solids (TDS). A number of commenters again objected to the reproposal of 1979 setting the standard at 10,000 mg/1 of TDS, and offered a number of alternative concentration levels. EPA has carefully reviewed these alternative suggestions and has once more decided to retain the standard of 10,000 mg/1 of TDS. None of the alternative concentrations have any superior justification in terms of current State practice, human health, or technological considerations. In the absence of any overriding argument to the contrary, the Agency will follow the standard in the House Committee Report accompanying the SDWA.

A number of other comments were offered on the scheme for designating underground sources of drinking water. Some pointed out an apparent conflict between Part 122 and Part 146, in that the former seemed to require the State Director to designate underground sources of drinking water while the latter seemed to require him to designate aquifers which were exempted from protection. Others urged the Agency to clarify the procedure for making the initial designation and the procedures whereby designation could be changed in the future. Still others pointed out that the use in the exemptions of such terms as "economically or technologically impractical" were imprecise and ought to be defined further. Finally, some argued that the exemption provided for "oil or mineral producing" aquifers seemed to imply that only areas actively being worked could receive such an exemption. They argued that the future development of mining sites could be hampered because of the uncertainty of whether or not the mining site could receive an exemption from the definition of underground source of drinking water. Therefore, they urged the use of the term "bearing" so that prospective mining sites would be assured of receiving a permit to operate, and thereby enhance their ability to obtain financing.

EPA agrees with some of these comments and disagrees with others. The final regulations attempt to clarify the definition of "underground source of drinking water" as well as the process for designation in the following way. The terms "underground source of drinking water" and "exempted aquifer" are defined in § 122.3. "Underground sources of drinking water" are aquifers or their portions which currently provide water for human consumption or which are capable of yielding water containing fewer than 10,000 mg/1 of TDS. Under § 122.35, the Director, as part of the State program he submits for approval to EPA, may identify those aquifers or aquifer portions which will be considered as underground sources of drinking water. This identification may be done by definition, description, illustration, or other means. The reason for this is to relieve the Director of the requirement for extensive underground exploration and mapping, or of supplying a level of detail with his State program submission which will force a modificaion of the State program for every minor modification in the depth or extent of the fresh water zone. As stated in § 122.31(d), an aquifer is an USDW if it fits the definition even if it has not been affirmatively identified by the Director.

An "exempted aquifer" is an aquifer or its portion which would otherwise meet the standard for an USDW but has been designated as "exempted" by the Director in conformance with § 146.04. Section 146.04 states that a Director may designate as an exempted aquifer an aquifer or aquifer portion which does not already provide water for human consumption but is capable of yielding water with a concentration of fewer than 10,000 mg/1 of TDS, if the aquifer or its portion is:

(1) Mineral, hydrocarbon, or geothermal energy producing;

(2) Situated at a depth of location which makes recovery of water for drinking water purposes economically or technologically impractical;

(3) So contaminated that it would be economically or technologically impractical to render it fit for human consumption; or

(4) Located over a Class III mining area subject to subsidence or catastrophic collapse.

The first three of these conditions have changed only in substituting the broader term "hydrocarbon" for "oil" in the first proposed criterion. The Agency has declined to change the term "producing" to "bearing" in the first condition because it did not want to open the possibility of wholesale exemption of aquifers, over large areas of the country, which become identified as being capable of producing one or another mineral. Similarly, the Agency has chosen not to define further the term "economically or technologically impractical." After considering the alternatives, the Agency decided it was more appropriate to leave the determination of what is or is not economically or technologically impractical to the discretion of the Director in the particular case.

The fourth exemption is new. It is an attempt to respond to those commenters who correctly pointed out that certain Class III mining operations necessarily involve the subsidence or collapse of strata above the injection zone. In such cases, the probability of harm to the overlying aquifers is substantial once operations are underway. The decision to protect these aquifers is more appropriately made at the time the mining operation is permitted.

In cases where the Director chooses to exempt an aquifer, he is required to submit not only detailed maps, but also sufficient justification in support of the exemption.

The Director may exempt aquifers as part of the State program he submits to EPA for approval. Therefore, the designations, by the nature of the process, are subject to public hearing and comment as well as the review and approval of EPA. The Director is free to change the designations or add to them at a later date. Such a change, however, would constitute a major modification of the approved State program and, as a major modification, is subject to public hearing and comment, as well as EPA review and approval.

C. Area of Review and Corrective Action. Most of the comments received on the revised area of review/corrective action concept contained in the reproposed 40 CFR Part 146 were generally supportive, although a number of specific suggestions were made. *First,* a number of commenters pointed out that the equation provided in the proposed § 146.06 was applicable only in certain circumstances. EPA agrees, but notes that in proposed § 146.06(c), the alternative calls only for the computation of the zone of endangering influence based upon certain parameters. The modified form of the equation provided in that section was illustrative and for the convenience of the reader. It was not intended to represent the only acceptable equation to be used in all cases.

Second, a number of commenters suggested that the applicant for a permit be given a voice in the decision of how the area of review would be determined for his well or field. EPA agrees and has added to the regulations giving the Director discretion to consult the applicant in this regard (§ 146.06). *Third,* some commenters suggested that the one-quarter mile radius be made an absolute minimum regardless of whether the zone of endangering influence was determined as fixed distance or through computation. EPA disagrees with this suggestion. In cases where the zone of endangering influence is actually less than a quarter of a mile, such a requirement would force the applicant to expend resources and do work which may not be justified by the expected benefits. *Finally,* some commenters suggested that the area of review be drawn from the edge of a field or project rather than the individual well. EPA agrees. The concept was included in the language of the proposed § 146.06(c) and has been retained in the final requirement.

Two comments were made with regard to the proposed corrective action requirement. The first suggestion was that the text of the proposed regulations seems to imply that it is up to the applicant to collect the information on the number of wells penetrating the injection zone within the area of review. The argument is that such information is kept by the State and, therefore, the requirement should be for the State, rather than for the applicant, to gather this information. The Agency agrees only in part. While it is correct that in many cases this information is in the files of the State, and, therefore, simplicity would suggest that the State should make use of this information in the review of the permit application, the Agency believes it important that the ultimate burden for providing the information necessary for an adequate review of a permit application should rest with the applicant and should not be transferred to the permitting authority. Therefore, the language of the final regulations makes it possible for the State to supply this information when, in the judgment of the Director, it is appropriate to do so. However, the final regulations do not explicitly relieve the applicant of the responsibility for making such information available when the Director deems it appropriate.

Another area of comment concerned the possible interpretation that in requiring corrective action on wells that penetrate the injection zone within the area of review, the Director may be put in a position of requiring the applicant to go onto the property of others, or to take corrective action on the property of others in order to meet the permit conditions. EPA agrees that it is inappropriate for these regulations to require an applicant to perform actions which may not be within his legal ability, as a condition or precondition of obtaining a permit. As a consequence, the corrective action requirement has been revised (§ 122.44) to provide the Director and the applicant with three options.

First, if he can arrange it with the neighboring owners and operators, the applicant may, before he begins to inject, take the corrective action prescribed by the Director and then inject at his intended injection pressure.

Second, the Director may issue a permit with a reduced injection pressure calculated so that the potential zone of endangering influence will be no bigger than the area under the control of the applicant in which the applicant can take the appropriate corrective action.

Third, the permit can be issued with the requested injection pressure but with the condition that the owner or operator must operate at a lesser pressure until such a time that he takes the corrective action required to allow a more extensive zone of endangering influence. In arriving at this resolution, EPA did not agree with suggestions that the State use its authority to force the owner or operator of the "bad" well to repair it. The Agency believes that it is not appropriate to use the authority of the State to force one individual, without his agreement, to incur expenses and effort which benefit another party. In addition, abandoned wells in the area of review also may have to be fixed. In many cases, it may not be possible to locate a responsible party.

D. Mechanical Integrity. Proposed § 146.08 defined mechanical integrity as having two parts: (1) The absence of a significant leak in the casing, tubing or packer; and (2) the absence of significant fluid movement into an underground source of drinking water through vertical channels adjacent to the injection well bore. The proposal specified that the absence of significant leaks was to be established through the use of eight listed tests. The absence of significant fluid movement could be demonstrated either through well records demonstrating the presence of adequate cement or the result of a cement bond log, sonic log, temperature log, density log, or dual neutron log. The proposed section further specified that the Director may allow the use of a test other than those listed upon the written approval of the Administator of EPA. The owner or operator of the well was to demonstrate the mechanical integrity of his injection well as a condition of authorization and at least every 5 years thereafter.

Virtually all aspects of this requirement received public comment. However, there does not appear to be a clear consensus in the thrust of the suggestions offered the Agency. Some commenters argued that a demonstration of mechanical integrity every 5 years is too frequent. Others argued that it is not frequent enough. Some questioned the reliability of cementing records, while others supported the use of such records and urged the Agency to go beyond its proposal by allowing the demonstration of mechanical integrity through the historical absence of contamination. Some commenters urged the Agency to rely on annular pressure tests; others disagreed. Some argued that the Director be given the discretion to specify which test he found acceptable as a demonstration of mechanical integrity. Some objected to the proviso that the Administrator approve the use of tests other than those listed in § 146.08. Others urged that such additional tests as the Director approves should be listed in the **Federal Register** for the use of others.

The majority of commenters did seem to agree in three areas. Most commenters urged the elimination of the words which seemed to require the use of more than one test to demonstrate the absence of significant leaks. Many commenters also found some fault with one or more of the tests specified by EPA in this section. Finally, in response to a request for comments in the preamble, many commenters supported the idea of a sampling approach to mechanical integrity rather than a requirement for universal demonstration.

EPA has carefully considered these comments and requested its consultant to conduct further technical analyses. Based on this work, EPA has decided to make the following changes in the final version of § 146.08.

First, EPA agrees that in order to demonstrate the absence of significant leaks in the casing, tubing, or packer of a well, any one of the specified tests is sufficient and has, therefore, eliminated the term "some combination."

Second, the analysis performed for us by Geraghty and Miller, Inc. suggested that the eight tests proposed as methods for demonstrating the absence of significant leaks were either incorrectly cited, redundant, or not particularly reliable in demonstrating the absence of leaks. Consequently, the final regulations retain only two of the eight tests listed in paragraph (b) of the proposed § 146.08. These are the monitoring of annulus pressure and pressure tests with fluid or gas.

Third, with regard to the listed tests to establish the absence of significant fluid movement in the well bore, the cement bond log, sonic log, density log, and dual neutron log have been eliminated, leaving temperature log or noise log as the specified tests. The basis for this decision is again the analysis conducted by the Agency's consultant.

Fourth, the requirement that the Administrator approve the use of tests other than those specified in § 146.08 has been retained, but in a different form. The use of alternative tests to demonstrate mechanical integrity is considered to be a major modification of the State program and must be treated as such under § 123.13. Two further points are worth discussing regarding mechanical integrity. The public comments and the work of our own consultant have raised some questions with regard to the reliability of historical well records to demonstrate the absence of fluid movement in the well bore. As a result, well records are no longer considered an acceptable method of demonstrating this aspect of mechanical integrity in the case of Class I and III wells. The use of well records has been retained for Class II wells because of the large number of wells in the Class and the statutory provision not to unduly interfere with or impede oil or natural gas production. However, the requirements for Class II wells will be subject to a mid-course evaluation. As one part of this evaluation, a sample of Class II wells, for which well records were used to demonstrate the absence of significant fluid movement in the well bore, will be required to perform the specified tests as well. This procedure will provide a comprehensive assessment of the reliability of well records and will provide a factual basis for future Agency decisions on whether to expand or eliminate the acceptability of well records to demonstrate mechanical integrity.

Finally, the preamble to the reproposed Part 146 (44 FR 23743–4) solicited comment on the possibility of requiring only a sample of wells, rather than all, to demonstrate mechanical integrity. Although many commenters supported this concept, the final regulations do not include any sampling approaches to the demonstration of mechanical integrity. Rather, the Agency decided to combine a test of the effectiveness of sampling with its decision to accept well records as a method for demonstrating the mechanical integrity only of Class II wells.

E. Area Permits. The 1979 version of the regulations proposed an area permit which would allow a number of wells of a similar purpose and construction under the control of a single owner or operator to be authorized by one permit. While most commenters approved this concept, they pointed out that the manner in which several sections of the proposal were worded seemed to imply that requirements would still have to be fulfilled on a well-by-well basis. One example of this was the information to be submitted in support of a permit application.

EPA agrees with this criticism and has clarified Part 146 throughout to make clear that a single permit for a number of wells can be applied for and obtained on an area basis. Section 122.39, dealing with area permits, has also been expanded to clarify the regulatory intent in this regard.

F. Logging and Testing Requirements. The sections of the 1979 proposal that received the most extensively adverse comments were the parallel requirements for Classes I, II, and III to conduct certain tests during the drilling and construction of wells and to report the information to the Director. Almost all commenters felt that specifying the actual logs and tests to be used was inappropriate, and, in most cases, overly inflexible. Upon consideration, the Agency agrees. These parallel sections for Classes I, II, and III have been changed. Final Part 146 requires deviation checks, but only for wells constructed with the use of pilot holes and reaming techniques. The Director is given discretion to specify the other logs and tests that may be required based upon the availability of similar data in the area of the drilling site, the construction plan and the need for additional information that may arise from time to time as the construction of the well progresses.

G. Control of Injection Pressures. The proposed regulations required the Director to establish limits on the injection pressure at the wellhead for Classes I, II, and III. In the case of Class I, the surface pressure was to be calculated so that the bottom hole pressure during injection did not propagate fractures in the injection zone and did not initiate fractures in the confining strata. For Class II, the surface pressure was to be calculated only so that the bottom hole pressure did not initiate fractures in the confining strata. Because of the special nature of Class III operations, the injection pressure at the wellhead was to be controlled so as to prevent the migration of fluids into underground sources of drinking water.

Several commenters suggested that there be no restrictions on injection pressure. Others offered specific alternatives as to how injection pressure should be controlled and what it should be designed to prevent. In particular, representatives of the oil and gas industry argued that the wording of this requirement could cause the loss of oil reserves valued at approximately $60 billion nationwide.

Upon further consideration of this requirement, the Agency finds that the original intent of these requirements was appropriate. However, two points of clarification are appropriate to resolve the problem pointed out by the commenters. First, in the final Part 146 the terms "injection zone" and "confining zone" are defined to include a single formation, part of a formation, or a group of formations. The regulatory concern of the Agency is that between the underground source of drinking water to be protected and the injection zone, there be a relatively impermeable barrier which is not breached by the injection pressure. This barrier may be composed of a single formation or a group of formations. Secondly, the proposed regulations used the term "bottom hole pressure" inappropriately. Because the friction loss across the perforations of the casing, the injection pressure in the formation is not equal to the bottom hole pressure within the casing. The concern of the Agency is with the pressure in the formation, and the final regulations have been changed to require the calculation of pressure at the well-head so as to produce an acceptable pressure in the injection formation as opposed to the casing at the bottom of the hole.

III. Changes in Individual Well Class Requirements

A. Class I. In the original 1976 proposal, the Agency had suggested a 5-year term permit for all classes of wells regulated under the UIC program. In response to extensive comments, the 1979 reproposal substituted lifetime permits for all classes to be regulated by permits. To balance the authorization of these practices for their entire life, Part 122 established extensive review, modification, and revocation and reissuance requirements. Most commenters found these requirements to be confusing and believed them to be inappropriately extensive.

In the final Consolidated Permit regulations, the Agency decided to move in the direction of term permits. Hazardous Waste Management program permits under RCRA as well as Class I permits under UIC will be issued for a period not to exceed 10 years. There are several reasons for this decision. The fluids injected into Class I wells, in many cases, are expected to pose a high degree of risk for the environment. Therefore, a greater degree of regulation is considered appropriate. Furthermore, Class I wells are more likely to be the group of facilities that will require multiple EPA permits since many of them are used at industrial sites where hazardous waste may be generated and surface discharge of waste also occurs. Term permits for Class I wells will ease the difficulty of consolidating and integrating various EPA permits to the same owner or operator.

To balance the shorter permit term, the consolidated permit regulations now provide the permit holder greater security during the term of the permit by restricting the reasons for which the permit may be reviewed, modified or revoked.

B. Class II. In addition to the changes affecting Class II wells discussed above, several additional changes for Class II wells are reflected in the final Part 146 regulations. The first of these is a change in the casing and cementing requirements for existing wells. In the original proposal of 1976, the Agency had required that all injection wells must be cased and cemented to protect drinking water sources containing up to 3000 mg/l of TDS. A number of commenters pointed out to the Agency that such a requirement was impractical and onerous. Since there is a rough correlation between depth and the concentration of TDS in ground water, a requirement for casing and cementing to protect levels of TDS higher than previously protected essentially means that an injection well will have to be cased and cemented to a greater depth.

Based on analysis undertaken after the 1976 proposal, the Agency agreed with the commenters that in many, if not most cases, it is impossible to extend the casing in an existing well. While it is possible to add cement to a well, EPA's consultants estimated that the cost of such a requirement in existing Class II wells could run upwards of $20 billion. However, in existing injection fields, there was some question as to the environmental benefit of protecting aquifers which had not been protected previously.

As a consequence, in the 1979 reproposal, EPA included § 146.22(c). This section granted the Director the discretion not to apply the Class II casing and cementing requirements to new or existing wells in existing injection fields under three conditions: (1) That State regulations for the construction of injection wells existed prior to the State UIC programs; (2) that such requirements had been applied to the injection wells in question; and, (3) that the injection wells did not cause a significant risk to the health of persons using the impacted USDW.

EPA's intention in this section was to alleviate the casing and cementing burden for existing Class II injection wells. The Agency believed, however, that some restrictions on the discretion of the Director were appropriate. For example, the Agency did not want to condone every casing and cementing practice, regardless of its potential for contamination, or to force the Director to authorize every injection well even if it posed a significant risk to the health of persons.

Commenters on the 1979 reproposal maintained that such a grant of discretion to the Director, with its limitations, did not really solve the problem. A major concern seemed to be that a number of States do not or did not have applicable casing and cementing requirements which would satisfy the conditions of proposed § 146.22(c).

These final regulations have been changed to clarify the relief that the Agency intended to grant. Final § 146.22(c) states that the Director need not apply the casing and cementing requirements of Class II if: (1) An existing or newly converted injection well in an existing field is in compliance with whatever State requirements were applicable to that field at the time the well was constructed, and (2) the injection will not cause the movement of fluid into an USDW so as to create a significant risk to the health of persons.

Newly drilled injection wells in existing fields are to comply with the requirements the State applied to that field prior to the effective date of the UIC program (§ 146.22(d)), and may not create a significant risk to the health of persons. If a State had no requirements for casing and cementing, the Director, in accordance with § 146.22(e), is to file a plan as part of his State program application which describes the casing and cementing requirements he proposes to set for wells in existing fields. If EPA approves, the State program becomes effective, and those will be the requirements to which injection wells in existing fields must conform.

Class II injection wells in existing fields will, however, have to demonstrate the integrity of such casing and cementing as they have.

The second change in Class II requirements concerns the conversion of wells, i.e., the practice of creating a new injection well by converting a well that had been drilled for other purposes. Many commenters pointed out that newly converted wells would have the same problems in meeting more extensive casing and cementing requirements as existing injection wells. Consequently, the application of the full Class II construction requirements to all new wells, including newly converted wells, was equivalent to prohibiting the practice.

The Agency agrees with these comments, and does not intend to prohibit the practice of converting existing wells. Consequently, newly converted wells have been included in final § 146.22(c) and (e). Whereas the proposed § 146.22(c) was limited to existing injection fields, the final relief applies to all existing fields, including those being converted to injection. Thus, the intended relief has been made available to converted wells also.

A third change concerns Class II reporting and monitoring requirements. A number of commenters pointed out that in many cases (particularly in the case of unitized enhanced recovery injection fields) monitoring is now conducted, but not on a well-by-well basis. The Agency has reviewed this question and has decided that no particular benefit is to be served by insisting on monitoring and reporting on an individual well basis, particularly since in many cases, such wells will be regulated under an area permit. Consequently, the final regulations now allow enhanced recovery injection wells to be monitored on a field basis, and the results of monitoring to be reported to the Director on the same basis.

Finally, in reviewing these regulations for promulgation, the Agency became aware of a potential problem resulting from the estimated time which might be consumed in processing permits for new wells. In many cases, the ability to produce from a new well may be contingent upon the availability of an injection well for disposing of the brine produced with the oil or gas. In existing fields, this is not expected to be a serious problem because disposal alternatives are expected to be available. However, in the case of wildcat explorations in new areas, fewer alternatives for disposal are expected to be available. Therefore, the production from a new well may have to be delayed until a permit for the construction and operation of a salt water disposal injection well is obtained. Based on our analysis, such delays could represent significant costs in terms of delayed oil and gas production.

To resolve this problem, § 122.40 of the consolidated permit regulation has been expanded. In addition to cases where imminent and substantial endangerment to human health exists, or cases in which a substantial and irretrievable loss of oil or gas resources will occur, a temporary authorization to construct and operate a salt water disposal well may be granted to avoid a substantial delay in oil or gas production. In such cases, an application for a permit must be filed, and the emergency authorization may be given until the Director acts upon the application.

C. Class III. In the preamble to the 1979 proposal of Part 146, the Agency gave notice that it had received extensive comments on the Class III requirements originally proposed in 1976. As the preamble noted, a number of the suggestions offered in response to the original proposals had been incorporated in the reproposal. However, as the preamble went on to state, (44 FR 23746) the Agency was continuing to evaluate alternatives for subcategorizing Class III requirements and was soliciting public comment on some additional fundamental changes. The public comments received on the 1979 reproposal urged the Agency to make some of these changes. The Agency agrees and has extensively revised the requirements for Class III.

Some of the following changes have already been discussed earlier in this preamble, but their impact on Class III is worth reviewing here. First of all, § 122.31(d)(2) of the final Consolidated Permit regulations lists as a specific exclusion, those wells which fall outside of the territorial waters of States. The rationale for this exclusion is that the Safe Drinking Water Act intended the UIC program to be a State and not a Federal program. When EPA promulgates and administers an UIC program, it does so in lieu of the State. Therefore, the Agency has judged it inappropriate to assert original Federal jurisdiction over offshore wells that operate beyond the territories of States. This exclusion exempts certain Class III operations from the coverage of these regulations.

A second important change is that the final § 146.04 now allows the Director to exempt from protection as underground sources of drinking water, those aquifers overlying the site of a Class III operation subject to subsidence or catastrophic collapse. This provision for exempting aquifers should be read together with final § 122.43 which states, that in cases where an injection well is not into, through, or above an underground source of drinking water, the Director may ease the conditions that he applies to a particular injection well or operation, provided that such eased requirements do not increase the risk of migration of fluids into underground sources of drinking water. This combination of provisions should make it possible to ease the burdens for Class III operations in a number of cases.

Third, one of the concerns of the comments on Class III was that the requirement that no new wells could begin to operate until they had been authorized by permit, could lead to a temporary disruption of operations while the permit was being processed. As in the reproposal, final § 122.37(a)(1) provides that existing Class III operations may be authorized under a rule until a permit is applied for and granted. However, the Section now also specifies that a Class III operator may continue normal operation, including the construction and operation of new wells, under the rule as long as he is in compliance with all applicable requirements.

Fourth, commenters were also concerned about the requirement that even under an area permit the prior approval of the Director had to be obtained before a new well could be placed into operation. As discussed above, the conditions for an area permit have been clarified in general. In addition, final § 122.39(c) now specifies that new wells may be constructed and operated under an area permit without prior approval as long as the new wells are in compliance with permit conditions, the owner or operator notifies the Director according to procedures established in the permit, and the cumulative effect of new well construction has been evaluated by the Director previously. The Agency believes that the four changes listed above should help to resolve many of the problems pointed out in the public comments.

One of the major areas on which public comment was requested in the preamble to the 1979 reproposal, was whether or not the technical requirements for Class III wells should be subcategorized. The commenters on the regulations overwhelmingly favored this course of action. However, the comments were less helpful in suggesting practical ways in which this could be done. To resolve this problem, the Agency has done considerable additional analysis to review Class III injection facilities from the perspectives of current prevailing practice, existing regulatory requirements and potential environmental consequences. (See report of Geraghty and Miller.)

Our review looked at 9 Class III practices: Frasch sulfur mining; the solution mining of uranium, salt, and copper; in-situ combustion of oil shale, coal, lignite, and tar sands; and the extraction of geothermal energy. The similarities and differences of these nine groups of wells were compared with respect to a number of parameters. With regard to potential environmental impact, for example, 6 of the 9 practices inject into zones that may contain aquifers that would qualify as potential underground sources of drinking water under the UIC definition. In 8 of the 9 practices, injection normally occurs through overlying aquifers which would also meet the definition. With the exception of geothermal energy wells, injection pressures tend to be relatively high, and, with the exception of the Frasch process, the produced fluids could be considered hazardous in that they contain at least heavy metals. In 7 of the 9 cases, subsidence or catastrophic collapse is expected to accompany the operation.

The review of existing State controls and current practice also revealed more consistent similarities than consistent differences among these 9 types of practices. Based on this analysis, EPA has chosen not to establish requirements by subcategory of Class III.

The following changes have, however, been made in the requirements for Class III. With regard to construction requirements, the new casing and cementing standard to protect underground drinking water is applied only to new wells since a requirement for additional casing and cementing for an existing well with a life expectancy of a few months would make little sense. Existing injection wells used in the solution mining of salt and the recovery of geothermal energy, which tend to have a longer useful life, would, however, have to demonstrate mechanical integrity. The requirement for the use of corrosion resistant materials has been retained. However, it should be noted that this does not necessarily mean fiberglass, 316 stainless steel, or other exotic materials. It only means that the material used in the well must be adequate to meet the design life of the well. The performance history of the material under field conditions would be an adequate basis upon which to decide the appropriateness of construction materials. Logging and other tesing requirements have already been discussed above. Deviation checks are required only in cases where construction involves a pilot hole with reaming. Other appropriate logging and testing is to be specified by the Director.

With regard to operating requirements, all new wells would have to demonstrate mechanical integrity before injection is begun. In the case of existing injection wells, only those with a longer useful life, such as the injection wells involved in the solution mining of salt and the production of geothermal energy would have to make an initial demonstration of mechanical integrity. Similarly, the periodic demonstration of mechanical integrity will apply only to the wells with longer life, i.e., salt and geothermal wells. The requirement for 5 monitoring wells has been removed, and monitoring requirements are now stated in terms of the objectives to be achieved. In the case of operations which inject into a formation which contains water with less than 10,000 mg/1 TDS, the requirement is that monitoring wells shall be completed into the injection zone and into any overlying USDWs. The monitoring wells shall be located in such a fashion as to detect any excursion of injection fluid outside the mining area. If the operation may be affected by subsidence, the monitoring wells shall be located so they will not be physically affected by the subsidence. In addition, in the case of injection wells which penetrate an underground source of drinking water in an area subject to subsidence, an appropriate number of monitoring wells is required to be completed into the underground source of drinking water to detect any migration of fluids. Again, the wells shall be located in such a fashion as to detect any migration and to be outside the physical influence of subsidence.

As noted above, the requirements have been clarified in a number of places to make them consistent with the use of area permits. For example, the information to be submitted to the Director specifies that this must be done only to the extent of establishing an adequate picture of the ore body and the subsurface geology in the mining site, but is not necessarily required in the case of each and every well.

The area of review requirement has been retained as proposed. This requirement, however, is not expected to place any undue burdens on the owner or operator. It is expected that the injector already has sufficient economic incentive to minimize the unintended leak of injection or produced fluids from the mining site. Furthermore, it should be noted that corrective action in the area of review is required only to preclude migration into drinking water sources. In cases for example, where the aquifers overlying the ore body have been designated to be exempted aquifers no corrective action may be required.

Finally, the final regulations have chosen to apply only limited aquifier restoration requirements on Class III as discussed earlier in this preamble.

D. Class IV. The coordination of RCRA and SDWA authorities in the regulation of Class I and Class IV wells used to inject hazardous wastes has been discussed earlier in this preamble. As stated there, the Agency has decided to require the operators of such wells to obtain interim status and to comply with the standards in 40 CFR Part 265 until the applicable State UIC program becomes effective.

In the final regulations, all wells which are used to inject "hazardous wastes," as defined under RCRA, are grouped into Classes I or IV. Standards for Class I wells have already been discussed above. Section 122.36 establishes, on an interim basis, a prohibition, also required for approvable State-administered programs, against the injection of hazardous waste directly into underground sources of drinking water. The prohibition is effective six months after the effective date of a State UIC program. Requirements applicable to other Class IV wells—those which inject above, but not into, USDW's—are reserved. Also reserved are additional requirements (for example, monitoring and retention of records) for Class IV wells injecting into USDW's.

Section 122.45 establishes additional requirements for operators of wells through which manifested hazardous wastes are injected. They apply to Class I wells and will apply to Class IV wells as final standards are established. This section essentially requires that the operator of such well comply with selected requirements established for hazardous waste management facilities under 40 CFR Part 122 Subpart C and 40 CFR Part 264.

The proposed standards for wells used to inject hazardous waste (122.45, 44 FR 34285, June 14, 1979) provided for a ban on the construction and operation of new Class IV wells, and a three-year phase-out of existing ones. The proposal would also have required that wells used to inject hazardous waste comply with the manifest and record-keeping requirements of the hazardous waste management regulations.

The final regulations reflect several changes from the proposal. *First,* the definition of Class IV has been narrowed. The proposal required only that: (1) The well be owned or operated by a generator of hazardous waste, or the owner/operator of a hazardous waste management facility; and, (2) that the injection be into or above an USDW in order to be included in Class IV. Commenters correctly pointed out that this definition could embrace wells that were not in fact used to inject hazardous waste. This condition has now been added to the definition of Class IV. The definition also clarifies that the injection has to be "into or above a formation which, within one-quarter mile of the well, contains an USDW" (§ 122.32). Conversely, the injection of radioactive waste has been added. (See discussion above.)

The *second* major change from the proposal is that the requirements for Class IV wells, other than those injecting hazardous wastes into an USDW, are reserved. There are several reasons for this decision. While few commenters questioned the basic premise underlying the proposal, some questioned whether, at least in some cases, the migration of fluid into an USDW would in fact cause any adverse effects either on drinking water supplies or human health. Other commenters suggested that a well should not be banned if it overlies a deep or remote USDW which it is not likely to contaminate. As noted above, commenters also indicated their belief that the definition of Class IV was too broadly drawn, and that, therefore, the proposed standard was unnecessarily protective. The Agency has reviewed these comments and is mindful of its obligation to proceed with extraordinary care before imposing an absolute ban on any practice. The Agency's concern in fashioning the proposal was to afford protection to drinking water sources. The Agency is not contemplating any changes which would sacrifice or endanger drinking water sources people rely on. Furthermore, wells injecting hazardous wastes are also subject to RCRA which mandates a broader set of environmental concerns than drinking water. Nevertheless, there may well be portions of aquifers so deep or remote that they may never serve as drinking water sources, or conditions under which a particular injection may not have an impact on the quality of the drinking water source.

A further reason for the current approach is that regulation under RCRA and SDWA touch at several points. Facilities under Class I and Class IV overlap the class of facilities designated under RCRA as hazardous waste management facilities. It is, therefore, appropriate that technical standards under RCRA and UIC be consistent, to the extent allowable under the governing statutes, for facilities capable of causing a similar degree of environmental risk.

EPA has decided to defer issuance of permitting standards for HWM facilities until the Fall of 1980. Adoption of UIC standards now for Class IV wells could prove misleading to the States and the public because EPA might decide later this year to revise the standards to reflect policy decisions made in connection with RCRA standards. The best course is to defer the technical standards for Class IV wells which inject above USDWs until this Fall. Accordingly, we now solicit further comment on requirements for Class IV wells.

EPA has under consideration several options which would allow Class IV wells to inject, in certain circumstances. In order to assist commenters, these options are described below. After consideration of comments, EPA will publish regulations in the Fall of 1980 amending either 40 CFR Part 122, Subpart C, or 40 CFR Part 146, or both. At that time, EPA may decide to prohibit all Class IV wells as proposed, adopt any of the options discussed below, or adopt any combination or modification of the options which appears justified based upon the record, including comments received.

The definitions of an USDW and the term "endangerment" are discussed above in detail. For the proposed regulations, EPA adopted a conservative approach to the designation of USDWs. Within this regulatory approach, two alternative methods suggest themselves for expanding the range of allowable Class IV practices. The first is to attempt a more precise distinction between ground water in general and ground water that serves or can reasonably be expected to serve as a source of drinking water. Option A takes this approach.

A second possible approach is to attempt a more precise definition of the circumstances under which the presence of contaminants in an USDW may or may not cause a system to exceed national primary drinking water (NPDW) standards or otherwise adversely affect the health of persons. Option B takes the latter approach.

Option A. This option would entail modification of the definition of a USDW to decline to protect USDWs in areas adequately served by other sources. EPA is aware of areas of the country which are underlain by aquifers containing immense quantities of useable fresh water, or where surface water supplies are so plentiful that they could reasonably be expected to supply all foreseeable needs for drinking water. In such cases, EPA is willing to consider a policy which would authorize injection through Class IV wells.

In this approach, an additional basis for exemption could be added to § 146.04 that would allow the Director to decline to protect an aquifer or its portion if it "otherwise cannot reasonably be expected to serve as a source of drinking water." To justify such an exemption, the Director could be required to consider the following factors:

- Present and future availability of alternative sources of drinking water;
- Future population growth and land use patterns in the area; and
- The expected growth in the demand for drinking water.

In keeping with the revised definition noted above, such wells would fall under Class I because they would inject into exempted aquifers (i.e., not into, through or above an USDW). Injectors would apply for permits with a duration of up to ten years as specified in 40 CFR Part 146 Subpart B, with one exception. The applicant would be required to make a showing that the injection would not impact aquifers or portions of aquifers protected as USDWs. Such a showing would involve a demonstration that the injection zone is not in hydraulic connection with or that the natural flow from the injection zone is away from protected USDWs.

The application would be processed as any other Class I permit application. Under § 122.43, the Director would have the discretion to require such permit conditions as he believes necessary to protect USDWs.

Option B. This option would recognize that the injection or presence of contaminants in an USDW may not necessarily lead to drinking water supplies exceeding the NPDW standards or adverse effects on the health of persons. Based on this rationale, a more liberal approach could be taken to regulating Class IV wells if the applicant could demonstrate that the injection: (1) Is environmentally the most acceptable method of disposal; and (2) would not contaminate the portion of the aquifer from which water is drawn for drinking.

Under such an approach, the standard that the applicant would have to demonstrate would be that:

- Technology for safe disposal is not available, taking costs into account;
- Disposal by injection will be less harmful than use of other available means; and
- Technology and other means will be employed to reduce the volume and toxicity of wastes.

The applicant would be required to demonstrate that the proposed injection is the most environmentally acceptable alternative available considering technology and the cost of:

- Trucking to approved site;
- Pretreatment prior to injection;
- Treatment and surface discharge;
- Pretreatment and discharge into POTW;
- Construction of a Class I well;
- Incineration; and
- Segregation of streams and/or reduction in flow.

He would also have to demonstrate that anticipated ground water impact will not adversely affect the health of persons or violate NPDWs based on the following information:

- Injection volume and pressure;
- Life of operation;
- Depth of well;
- Direction of ground-water flow;
- Proximity to use;
- Monitoring up-gradient and down-gradient;
- Geological and hydrological data; and
- Closure plan.

There would be certain common elements under both options. Injectors would be required to obtain a permit to operate a Class IV well within one year of the effective date of the State program or close. Permits could be for a duration of 10 years, and new wells would be subject to the requirement in § 122.33 that a permit be obtained prior to the construction of a new well.

Similarly, there are certain common questions with regard to implementation under either option. The Agency solicits specific, detailed comments on these questions: *First*, do factual circumstances exist in which EPA should allow injection of hazardous waste into or above an underground source of drinking water? *Second*, if so, what information should be required of the applicant to show that the injection will not endanger drinking water sources, and what criteria should the Director use in granting or denying permits? *Third*, should new and existing Class IV wells be treated differently or alike? *Fourth*, should the decision to allow the use of a Class IV well be made as part of a statewide or regional plan (e.g., Sec. 208, land use, RCRA Sec. 4007 solid waste plan, UIC program application) or as part of the individual permit decision? *Fifth*, what factors should be considered in subdividing aquifers into relatively confined exempted areas and USDWs? *Sixth*, what procedures should be imposed to ensure full public participation in decisions to allow injection through Class IV wells? *Seventh*, what kinds of post-closure care requirements (monitoring, third-party liability, use restrictions) should be imposed on Class IV well operators? *Eighth*, are the authorities under SDWA and CWA sufficient to prevent the potential impacts of such injections or should RCRA authorities be invoked to meet environmental concerns such as aquifers discharging to streams and surface impacts on vegetation?

E. Class V. EPA received a number of comments with respect to Class V, suggesting that the two years allowed for the completion of an assessment and submission of State recommendations to EPA was insufficient. The Agency agrees with these comments. Consequently, these final regulations now allow the State three years instead of two years to complete the assessment of Class V wells and to submit recommendations for further regulation to EPA.

Amendments to Part 122

In the process of preparing the final Part 146 regulations, it became apparent that certain portions of the final consolidated permit regulations (45 FR 33290, May 19, 1980) would have to be amended to conform to the Agency's final decisions with regard to the UIC program. Four sections of Part 122 are amended as a part of this promulgation. This procedure is intended to avoid major inconsistencies between Parts 122 and 146. It is not intended to preclude further amendments that may be necessary, or to substitute for technical corrections (e.g., faulty cross references) of the consolidated permit regulations which the Agency still plans to make in the near future.

Section 122.18(c)(4)(ii). This paragraph in the final consolidated regulations required the Director to provide the Administrator with the necessary information to conduct a mid-course evaluation of the corrective action requirement as it applied to Class II wells. The Agency has decided to expand the mid-course evaluation in three ways: (1) It is to apply to Classes I and III as well as Class II; (2) it is to cover mechanical integrity in addition to corrective action; and (3) States are to provide the information every six months during the first two years of program operation rather than once at the end of two years. The amendment conforms the reporting requirement with this decision.

The Agency decided upon this course of action because we anticipate that an expanded mid-course evaluation will yield reliable information earlier than the promulgated scheme as a basis for any refinements in the UIC program requirements. This decision is discussed more fully as part of the evaluation plan described later in this preamble.

Section 122.37. This section detailed the requirements applicable to the authorization of injection wells by rule. It is revised to clear up some possible ambiguities with regard to the requirements applicable to certain types of rules. Specifically, paragraph (b) of the section may have raised questions with regard to the responsibilities of Class V injectors. Paragraphs (a) and (b) of the section have been revised extensively to clarify the Agency's intent. Paragraph (d)(1), relating to the contents of the injection well inventory is also amended. The current text inappropriately references § 146.52 which is a requirement for Class V. The revised text enumerates the information required on the national form for the inventory of injection wells (OMB #158–R0170), but does not change the substance of what is required.

Section 122.41(e). Paragraph 122.42(f) requires applicants for permits to submit a plan for plugging and abandonment, and specifies that the Director shall incorporate the approved plugging and abandonment requirements as conditions of the permit. The Agency chose this course of action because its concern for the proper abandonment of wells led it to establish such requirements as enforceable permit conditions. However, the permit terms for the UIC program may be long: up to ten years for Class I and up to the life of the well or facility for Classes II and III. Abandonment plans filed with the permit applications may easily be out of date by the time an injector is ready to close his well or facility. For the protection of both the injector and the environment, therefore, this requirement is amended by requiring the permittee to submit an updated abandment plan along with his 180-day notice. The Director is to review the updated plan, revise the relevant permit conditions as appropriate, and grant approval for the permittee to proceed with plugging and abandonment (see §§ 146.10, 146.14(c), 146.24(c) and 146.34(c)). Section 122.17(f) is amended to allow the permit to be modified to reflect this new plan as a minor modification.

Regulatory Analysis

The regulatory analysis consists of five basic sections: economic and financial profiles; alternatives considered; costs to industry and the States; impacts on the production of oil; and economic impacts on firms, regions and the economy. The cost section was entitled "Economic Impact" in the preamble to the proposed regulations. It has been revised to show current estimates as well as to describe the reasons for change from the earlier analysis which appeared in the preamble. EPA's consultant did not include the cost associated with wells producing only gas because the percentage of injection wells associated with such wells is small in comparison with injection wells related to oil production.[1] Although the cost estimate is somewhat lower than would have resulted, had gas wells been included, EPA notes that other conventions which were adopted in the cost analysis tend to introduce possible overestimates in the overall cost of the program. To illustrate, as a result of the mid-course evaluation, changes might be made to the Regulations which would substantially reduce the cost to operators of determining the mechanical integrity of wells and performing remedial action.

Nevertheless the cost of the Regulations have been estimated as if there would be no relaxation of these requirements. In addition the Regulations allow, in 40 CFR 122.22(b)(3), the relevant authority to accept limited injection pressure in lieu of corrective action, if it can be demonstrated that the pressure of the injection zone does not exceed hydrostatic pressure at the site of any improperly completed or abandoned well within the area of review. Nevertheless, in estimating the cost of compliance, it was assumed, in all cases, that corrective action entailed physical repairs rather than pressure limitation. This assumption leads to an overestimate in the cost of the program.

Economic and Financial Profile

Overview. This section examines the impact of the regulations on operators of Class II and III wells. The relatively large number and dispersion of Class I, IV, and V wells among different industries precluded investigation of the economic impacts of regulation of these classes of wells.[2] However, the aggregate cost to operators and States have been included in the cost estimate.

On the whole, the impact of the Regulations on operators of Class II wells is expected to be relatively minor. It is estimated that a loss of crude production of about 13,000 barrels per day will result, which represents less than half of one percent of U.S. production at 1977 price and profit levels.[3] On a regional and producer level impacts will be more variable, depending upon the relative proportion of stripper wells, average stripper well production, company size and past construction practices. It is anticipated that operators in Illinois and the Mid-continent and Appalachian areas will be affected to a greater extent than other operators because these areas are characterized by poor completion practices and a large number of abandoned wells.[3a] Since production from stripper wells in these regions is relatively low, the net effect of the regulations may be the closure of those wells which produce very small amounts of oil but are likely to be the ones having potentially the greatest adverse impact on underground sources of drinking water.

Similarly the regulations will have no significant impact on Class III operators because compliance costs are relatively small, and the firms which engage in these practices are generally diversified and in sound financial condition.[4]

Oil and gas.[5] The oil and gas producing industry is comprised of a large number of firms but is dominated by a handful of vertically integrated corporations commonly known as the "majors". The majors engage in a full spectrum of activities including exploration, development, production, refining, transportation and marketing. The balance of firms in the industry, commonly known as "independents", are more diverse in structure. Although some independents engage in the same array of activities as the majors, they generally tend to focus on exploration, especially "wild catting".

Concentration in the petroleum industry is moderately high compared to other manufacturing industries. As indicated in table 1 the eight largest firms account for approximately half of industry revenues, which were $32.5 billion in 1977. Between 1973 and 1977 revenues have more than doubled. Net income, as a percent of net worth, was substantially higher in the five year period since the Arab oil embargo than the previous five year period. Despite the fluctuations in the net income/net worth ratio during the early part of the era ushered in by the embargo, it appears that the events of 1973 have reversed a general decline in this measure of profitability. Profitability appears to be increasing and the current increase in oil prices made possible by decontrol suggests that the trend will continue. (Table 2).

Table 1.—*Concentration, Oil and Gas Companies*

Firms	1973		1974		1975		1976		1977	
	Revenue billions (dollars)	Percent	Revenue billions (dollars)	Percent	Revenue billions (dollars)	Percent	Revenue billions (dollars)	Percent	Revenue billions (dollars)	Percent
Largest 8	7.6	53	11.4	51	12.6	50	13.8	48	15.0	46
Next 9-32	3.8	26	6.0	27	6.8	27	7.5	26	8.7	27
All Other	3.0	21	4.9	22	6.0	23	7.3	26	8.8	27
Total	14.4	100	22.4	100	25.4	100	28.4	100	32.5	100

Source: Booz, Allen and Hamilton, Underground Injection Control Program . . ., P. II-12.

Table 2.—*Profitability of Petroleum Industry*

	Net income as a percent of net worth	
	Petroleum production and refining	Total trade
1967	12.8	13.2
1968	13.1	14.1
1969	11.9	13.5
1970	11.0	11.7
1971	11.2	11.7
1972	10.8	11.7
1973	15.6	12.7
1974	19.6	13.5
1975	13.9	13.0
1976	14.8	14.7
1977	14.0	15.0
1978	14.3	15.2

Source: Booz, Allen and Hamilton, *Underground Injection Control Program* . . ., p. II-14.

Frasch sulfur production. There are three major sources of domestically produced sulfur: (1) Recovered elemental, in which sulfur is produced as a by-product of natural gas processing and petroleum refining; (2) recovered sulfuric acid, in which sulfur is produced as a by-product of copper, lead, and zinc roasting and smelting; and (3) the Frasch process. Production by the Frasch process has declined between 1974 and 1977 while demand and prices have increased (Table 3). This decline is largely due to increases in the cost of heating water used to melt the sulfur, due to sharp increases in the price of natural gas. By the year 2000 it is possible that production by the Frasch process will be phased out, with expected increases in demand satisfied from present competing sources.[6]

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[1] Arthur D. Little, Inc., *Cost of Compliance. Proposed Underground Injection Control Program. Oil and Gas Well.* (June, 1979), p. 19.

[2] Booz, Allen and Hamilton, Inc., *Underground Injection Control Program. Industry Analysis of Class II and Class III Well Regulation.* (April 30, 1980) p. 1-2.

[3] *Ibid.*, p. III-4.5.

[3a] *Ibid.*, p. IV-3.4.

[4] *Ibid.*, p. III-14.18.

[5] For this discussion see *ibid.*, pp. II-8 to II-14.

The production of sulfur by the Frasch process is highly concentrated. In 1978 only five companies operating at ten sites produced sulfur by this method.[7] These companies have complete control over all phases of the production of sulfur. With one exception they are divisions of diversified companies whose sulfur sales represent, in most cases, a small portion of their total sales. These companies are financially secure, and their earnings outlook has improved owing to the growing demand for fertilizer, which they also produce and market.

Table 3.—*Sulfur Industry Data*

[Thousands of metric tons]

	1974	1975	1976	1977	1978
Domestic Production—					
Frasch	7,901	7,211	6,264	5,822	5,648
Recovered elemental	2,632	2,969	3,138	3,567	4,088
Other	886	1,079	1,305	1,169	1,439
Imports	2,150	1,897	1,727	1,977	2,177
Exports	2,663	1,352	1,270	1,178	866
Domestic Demand	10,906	11,804	11,164	11,357	12,486
Average Annual Price Per Metric Ton	$28.42	$44.91	$45.72	$44.38	$45.17

Source: Booz, Allen and Hamilton, *Underground Injection Control Program* . . ., p. II–6.

Solution Mining of Salt.[8] About 60% of domestic salt production is by the injection process. Most of the solution mining wells are located on the Gulf Coast, primarily in Texas, Louisiana, and Mississippi. The major demand for salt is by the chemical industry, which uses about half of all salt produced in the U.S. for the production of chlorine and soda ash. Consequently, demand fluctuates with the demand by the chemical industry. About thirty companies produced salt by injection method in 1978. These companies generally employ other methods as well, namely, conventional mining and evaporation of brines.

In general companies producing salt are vertically and horizontally integrated. They tend to be involved in the production of chemicals, oil and gas, minerals, metals and pharmaceuticals. It appears that salt production is of relatively minor importance to these firms.

Solution Mining of Uranium. In 1978, there were ten firms mining uranium by the in-situ process. In general these firms are large conglomerates with holdings in other minerals, as well as oil and gas production. EPA could not obtain financial information on uranium mining firms because such information is not available. Furthermore, production information is confidential, which makes it impossible to ascertain mine or company output with any degree of precision.[9] Consequently, it is not possible to provide descriptive economic and financial information on the uranium mining industry in general, or the solution mining component, in particular.

Solution Mining of Potash.[10] Potash is used primarily in fertilizer as the source of potassium. Overall domestic demand for potash has been relatively stable since 1974, but domestic production has been falling as a proportion of total use. In 1965, domestic production represented 93% of demand, but in 1978, only 37%.

There are ten companies which produce potash, but only the Texas Gulf Company uses the solution mining technique. The remaining firms employ conventional mining or recovery from surface brines. As a proportion of total domestic production, the amount represented by the solution mining of potash is minor—1.25%.

Solution Mining of Copper.[11] The solution method is used to recover copper from low grade deposits. Presently, there are no commercial in—situ sites. Three marginally profitable solution sites and one experimental site were closed in 1978 due to depressed copper prices. Despite rapid price increases recently these sites have not been reopened.

In-Situ Oil Shale Combustion.[12] There are four projects in various stages of development, but none have progressed to full commercial use. Two of them—the Geokinetics, Inc. site in Utah, and the Equity Oil Co. site in the Piceance Creek Basin, Colorado—are still in the research and development stage. The others—the Rio Blanco Oil Shale Project, and Federal Lease Tract C both in the Piceance Creek Basin—are in the development stage, with burns scheduled for 1980. Even under favorable conditions the latter project, which is the most advanced of all the sites, is not expected to produce any sizeable amount of oil until 1986.

Gasification of Coal.[13] The Federal Government has sponsored research designed to demonstrate this technology since 1973, and three privately funded ventures have been organized since 1975. At this time none has progressed to commercial production. The most advanced sites are at the field test stage. The Department of Energy does not anticipate the commercialization of either of the sites it supports before 1987.

In-Situ Tar Sands Recovery.[14] Tar sands are heavy petroleum (bitumen) which will not flow into a well bore without stimulation. Ninety-eight percent of domestic resources are located in Utah. At this time, the technical feasibility of in-situ tar sands recovery is uncertain due to the lack of geologic and reservoir data.

Geothermal Energy.[15] The major use of geothermal energy is in the production of electricity. Such production, amounting to an installed capacity of 663 megawatts, is insignificant as a proportion of total U.S. production. Expansion of the use of this source of energy is hampered by high costs of development, long delays in obtaining permits and relatively high cost compared to generation by use of oil or gas. By 1985 this source may be price-competitive with oil and gas. However, at this time, only a small number of lease holders and owners of geothermal resources have undertaken its development.

Alternatives Considered

The Safe Drinking Water Act requires EPA to develop minimum requirements for effective state programs to protect underground sources of drinking water from the subsurface emplacement of fluids through well injection. The Act, however, also requires the Agency not to prescribe requirements which interfere with or impede the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or any underground injection for the secondary or tertiary recovery of oil or natural gas unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

In recognition of these requirements EPA considered numerous alternatives, spanning the range from no regulation at all to stringent levels of protection which would cost industry tens of billions of dollars. The following discussion will provide an understanding of the alternatives which received serious consideration but were eventually rejected.

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[6] *Ibid.*, p. II–20.

[7] *Ibid.*, p. II–21.

[8] For this discussion see *ibid.*, pp. II–26–29.

[9] *Ibid.*, p. II—28.

[10] Generally, *ibid.*, pp. II–29 to II–32.

[11] Generally, *ibid.*, pp. II–32 to II–36.

[12] Generally, *ibid.*, pp. II–36 to II–39.

[13] Generally, *ibid.*, pp. II–39 to II–41.

[14] Generally, *ibid.*, pp. II–41.

[15] Generally, *ibid.*, pp. II–42 to II–50.

Through an understanding of the nature of the alternatives and reasons for their rejection EPA hopes to instill an appreciation for the complexity of the problem it faced and for the balance it believes was achieved in the promulgated regulations.

I. Alternatives to Regulation

The promulgated regulations are based on the concept of prevention, which EPA believes reflects the intent of Congress in enacting the Safe Drinking Water Act. Through controls on the siting, construction, operation and abandonment of injection facilities, underground sources of drinking water will be protected from endangerment. An alternative to this concept is an approach which might be termed the "restitution" approach. It entails the creation of a fund, either through insurance premiums or other sources such as general tax revenues, which would be used to rectify any damage to an aquifer. The restitution alternative was not adopted for three reasons. First, it is inconsistent with the preventive nature of the Safe Drinking Water Act which requires EPA to promulgate regulations which contain minimum requirements for effective State programs to protect underground sources of drinking water. Second, the size of such a fund would have to be based upon an estimate of risk of contamination and the future value of the aquifer, both of which are unknown. And finally, even if such estimates were available there is no known technology by which a contaminated aquifer can be economically restored.

II. Alternative Regulatory Provisions

A. Class I.—1. *Treatment of nuclear wastes.* In the 1979 proposed regulations Class I was defined as "industrial and municipal disposal wells and nuclear storage and disposal wells that inject below all underground sources of drinking water".[16] The final regulations include nuclear storage and disposal wells which inject below underground sources of drinking water in Class V. EPA still considers such wells to require careful control. However, it believes that the control of such wells should be determined as part of the overall review of the disposal of nuclear wastes initiated under the President's Program of Radioactive Waste management, as described in the Message sent to Congress on February 12, 1980. Therefore, rather than prescribe specific construction requirements which may require modification in the near future, EPA concluded that it would be preferable to assess such wells and fashion appropriate regulatory requirements, in keeping with the President's program, in the future. (Wells which inject nuclear wastes directly into underground sources of drinking water are regulated under Class IV, however).

B. Class II.—1. *Casing cemented to the surface.* The regulations require that "* * * all new drilled Class II injection wells shall be cased and cemented to prevent migration of fluids into or between underground sources of drinking water" with the specific requirements left to the discretion of the State Director upon consideration of several factors as detailed in 146.22(b). An alternative considered would have required the cementing of surface casing from the injection zone completely to the surface as a way of ensuring that there would be no fluid migration along the exterior of the casing, or communication between water bearing strata. This alternative was not adopted because such a requirement, in EPA's view, far exceeds that which is necessary to prevent fluid movement. EPA believes that such a requirement would have interfered with or impeded the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or underground injection for the secondary or tertiary recovery of oil or natural gas without being essential to assure that underground sources of drinking water will not be endangered by such injection. To illustrate, if the Agency had required full cementing to protect underground sources of drinking water containing 3,000 ppm or less total dissolved solids, EPA estimates the cost to operators would have been roughly $20 billion over the first five years of the UIC program in 1977 prices.

2. *Interstate Oil Compact Commission (IOCC) proposal.* The promulgated Regulations do not differentiate between injection, producing and abandoned wells, based upon their age. The IOCC proposed that such a distinction be made as follows:

a. New wells and wells drilled or completed prior to 1947 would receive new permits based on mechanical integrity, area of review and remedial action;

b. Wells completed between 1962 and the time the State program goes into effect would continue under existing permits;

c. Permits for wells drilled or completed between 1947 and 1962 would be reviewed for compliance with standards prevailing since the early 1960's. Permits for wells that generally met the standards would be revalidated. Wells that clearly fall short of the standards would be re-permitted.

Many of the features of this proposal were adopted. New wells may not be constructed and operated without a permit; existing enhanced recovery wells may be operated under rule (although mechanical integrity tests are required to ensure that they remain sound); wells injecting in an existing field need only comply with standards for casing and cementing in existence at the time of drilling of such wells. Hence some of the major features of the IOCC proposal were adopted. It was not adopted in toto because under (b) it would have allowed wells completed between 1962 and the time the UIC program went into effect to be operated even if they were not mechanically sound. While EPA agrees that older wells may be more likely to fail owing to corrosion and other problems, it also believes that many newer wells may be subject to leakage and fluid migration due to the use of cement of insufficient quality, poor workmanship, a corrosive environment, human error, or other factors.

3. *Area of review alternatives.* Because of the high concentration of producing and abandoned wells in existing oil fields the overall cost to operators of the UIC program is largely determined by the extent of the area of review and nature of testing and remedial action required on wells within it. EPA devoted considerable effort to the identification and evaluation of alternative approaches. In its deliberations, EPA considered:

a. Applying it to all injection wells, both enhanced recovery and disposal, new and existing;

b. Applying it to new injection and existing disposal wells;

c. Requiring the radius to be a minimum of ½ mile of a new enhanced recovery or disposal well if the zone of endangering influence is not determined by the use of the Theis or similar equation;

d. An ad-hoc area of review, as practiced in Texas and Louisiana, and;

e. Eliminating the area of review requirement entirely.

Had alternative (a) been selected it would have required that virtually every injection, producing, and abandoned well of record in the United States be examined and, if necessary, either repaired, abandoned, or reabandoned within five years of the date the program became effective. Considering that there were about 1.2 million abandoned wells of record, 505,000 producing and 119,000 injection wells at the end of 1976, plus a net increase of some 25,000 new injection wells during the first five years of the program, EPA concluded that so comprehensive a requirement would have unduly impeded oil and gas production.

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[16] 44 FR 23740, April 20, 1979.

Option (b) was discarded for the same reason. Although fewer wells would have been reviewed within the first five years EPA believed that it would have unduly interfered with or impeded oil and gas production without being essential to assure that underground sources of drinking water will not be endangered. Similiarly alternative (c) was rejected for the same reason. Had the one half mile radius for the area of review been adopted, 171,000 producing wells and 302,000 abandoned wells would have been evaluated, and 20,000 repaired. At the one fourth mile radius there is a reduction of some 77,000 producing and abandoned wells in the area of review. At the smaller radius, the number of producing and abandoned wells needing remedial action is approximately 17,000 compared to about 20,000 at the ½ mile radius.

The ad-hoc alternative (d) would require the testing and appropriate remedial action to wells in the area of review of a new diposal well only if the regulatory authority received a complaint within the ten days of the filing of a permit application. While its low cost makes it appealing, this option was rejected because it would have provided for remedial action to faulty wells only after environmental damage had become visible.

Alternative (e) was rejected because even though the injection well was sound, other nearby wells could still serve as pathways for potential endangerment.

Radii less than ¼ mile were not considered because actual computations by EPA of the zone of endangering influence indicate that, in most instances, the appropriate distance is less than ¼ mile. Setting the radius at ¼ mile thereby ensures that all wells within the zone of endangering influence will be examined.

4. *Other alternatives to reduce or spread out program costs.* a. Sampling a small portion of wells for mechanical integrity. Testing and reporting the results of mechanical integrity tests on injection wells accounts for approximately $96 million of total program costs. EPA considered random sampling as an alternative to testing of all wells. This approach was not adopted because data essential to the design of the sample, e.g., the different sampling strata to sample and expected failure rates, are not available. A random sample would provide an estimate of failure rates but would fail to locate all defective wells. [16a]

b. *Assessment/Postponement.* This option would postpone the date by which permits are required by about three years while the States planned and conducted an assessment of injection practices. The data base resulting from this approach would then be used to formulate a regulatory program. This alternative was rejected for two reasons. First, the assessment would have required an expensive survey in each state and would not provide a valid test of the area-of-review concept. Second, the program would have been delayed three years, which was judged by EPA to be unacceptable.

c. *Exempting stripper-related injection wells.* Approximately three-quarters of all producing wells are strippers, which are wells producing ten or fewer barrels of oil per day. It appeared that exempting from regulation injection wells associated with strippers would achieve the dual objective of reducing program costs substantially while sparing the least productive wells the burden of the cost of compliance. Unfortunately, the very reason that enables the savings in program costs also weighs against the adoption of this alternative. To exclude three-quarters of all producing wells from any kind of review would undermine the effectiveness of the program for two reasons. First, strippers number among them some of the oldest wells drilled in the U.S. Old stripper wells are not drilled to current standards and are the ones most likely to endanger underground sources of drinking water. Second, because of their numbers and widespread distribution entire regions of the country will be left unprotected if injection wells associated with strippers are exempted.

d. *Exempting injection wells with an open annulus from pressure testing.* The promulgated regulations require pressure testing of all injection wells for casing leaks. Where the annulus is enclosed, the cost of such a test is estimated to be thirty dollars.[17] However, if a well does not have an enclosed annulus the cost of testing is estimated to be $1500.[17] Over the first five years of the program the cost of testing wells with an open annulus is estimated to be $65 million, and affects about 43,000 wells. EPA considered eliminating the testing requirement, but decided to retain it because of the large number of such wells and their potential for widespread contamination.

5. *Other, more stringent alternatives.* As discussed under (1) and (3) above, more stringent alternatives rejected were: Continuous cementing from the injection zone to the surface; area of review for all injection wells, and a half-mile, rather than quarter mile, area of review. Following are three additional alternatives which were considered by EPA. Each would have imposed more stringent requirements than those promulgated:

a. *Continuous monitoring of injection pressure, volume and flow rate.* Unlike the continuous monitoring required for Class I and III wells, such monitoring was considered but rejected for Class II because the injected fluid, being less toxic and corrosive than that of Class I and III wells, does not require constant surveillance. In addition, the Agency believes that the cost of continuous monitoring would have been excessive in view of the potential for harm to human health.

b. *Absolute construction ban without a permit.* In the case of a non-controversial application EPA estimates that the process will require about 105 days over and above current State permit processing times. For wildcat operations EPA believes that such a delay would be particularly expensive and would have unduly interfered with or impeded oil and gas production. Consequently, the promulgated regulations allowed the issuance of temporary emergency permits if it can be demonstrated that "a substantial delay in production of oil or gas resources will occur unless temporary emergency permit is granted to a new Class II well and the temporary authorization will not result in the movement of fluids into an underground source of drinking water." [18]

c. *Extending coverage to wells storing hydrocarbons in a gaseous state.* The April, 1979 proposed regulations included all forms of hydrocarbon storage under the definition of Class II.[19] Wells storing hydrocarbons which are a gas at standard temperature and pressure have been excluded from Class II in the promulgated regulations because gas is highly unlikely to result in the chemical contamination of drinking water even if it migrates from the injection zone. In addition such wells may be properly maintained owing to strong economic incentives to prevent loss of the stored gas. These wells have been transferred to Class V for further study.

[16a] Booz, Allen and Hamilton, *A Study of Sampling Procedures as Applied to the Mechanical Integrity Testing of Injection Wells.* (April 30, 1980), Executive Summary, pp. 1,2.

[17] Arthur D. Little, Inc., *Cost of Compliance. Proposed Underground Injection Control Program, Oil and Gas Wells.* (June, 1979), p. 96.

[18] 40 CFR 122.40(a)(3).

[19] 44 FR 23738, April 20, 1979 and 44 FR 122.34(b), June 14, 1979.

C. In response to comments that Class III wells were too diverse to be covered by common requirements, EPA undertook a detailed evaluation of their physical characteristics and potential for contamination of underground sources of drinking water in order to determine if subclassification of Class III wells was appropriate.[30]

The review looked at 9 Class III practices: Frasch sulfur mining; the solution mining of uranium, salt, and copper; in-situ combustion of oil shale, coal, lignite, and tar sands; and the extraction of geothermal energy. The similarities and differences of these nine groups of wells were compared with respect to a number of parameters.[31] With regard to potential environmental impact, for example, 6 of the 9 practices inject in zones that may contain aquifiers that would qualify as potential underground sources of drinking water under the UIC definition. In 8 of the 9 practices, injection normally occurs through overlying aquifiers which would also meet the definition. With the exception of geothermal energy wells, injection pressures tend to be relatively high, and, with the exception of the Frasch process, the produced fluids could be considered hazardous in that they contain at least heavy metals. In 7 of the 9 cases, subsidence or catastrophic collapse is expected to accompany the operation.

The review of existing State controls and current practice also revealed more consistent similarities than consistent differences among these 9 types of practices. In addition, the theoretically preferable criterion cannot be translated into operational terms. According to EPA's consultant, "perhaps the most logical way to subclassify the Class III wells, would be in terms of the relative threats to the ground-water environment posed by different practices." [32] However the Agency's consultant also concluded that the " * * * overall threat to the ground-water environment that might be posed by a particular type of injection well in Class III depends to a large degree on the site-specific hydrogeologic situation." [33] The agency cannot develop consistent National Standards based upon diverse, local, hydrogeologic factors. Therefore, EPA has chosen not to subclassify Class III. However, in recognition of the relatively short service life of wells other than salt solution and geothermal,[34] EPA concluded that the mechanical integrity testing requirements for certain existing wells in Class III should be relaxed.

Consequently, prior to granting approval for the operation of a Class III well, the operator is required to demonstrate mechanical integrity only for all new Class III wells and existing salt and geothermal wells. In addition, only the operators of salt solution mining and geothermal wells are required to demonstrate mechanical integrity every five years.[35]

Two, more stringent alternatives were considered for the abandonment of Class III wells, notably those relating to uranium mining: Aquifer restoration, and containment of injected fluids. The restoration alternative was not adopted because the technology is still in the experimental stage. Since EPA cannot evaluate the effectiveness of this technology it concluded that it was premature to require it now as a National minimum requirement. However the Director is given the discretion to require aquifer restoration on a case-by-case basis.[36] As for the containment alternative, the Agency concluded that because of the long decay time of radioactive substances, containment would require monitoring and testing of water quality for hundreds of years, which the Agency does not believe to be administratively feasible at this time.

D. Classes IV and V. Four alternative approaches were formulated for regulation of wells which inject directly into or above underground sources of drinking water: [37]

1. Within the UIC regulations, require a permit program for at least some of these practices;
2. Within the UIC regulations, require the states to assess the threat of contamination from these wells and submit a detailed state plan to EPA;
3. Withdraw consideration of these wells from the UIC regulations and study them in a separate national assessment; and
4. Within the UIC regulations, require state assessment of these wells coupled with regulatory control over the most potentially harmful practices. The main features of alternative number 1 are:

- The Director would have the discretion to ban immediately those categories of practices which present an unreasonable risk to health and to ban, after an appropriate period of time, all categories of practices for which economically feasible alternatives exist;
- The Director would determine, for those practices not banned, which practices in the state should be regulated by permit rather than by rule;
- Exemptions would be allowed based upon criteria such as toxicity and/or volume, hydrogeologic characteristics, and population in the area relying on the affected underground sources of drinking water;
- The Director would impose monitoring, record-keeping and reporting requirements for each permit. In addition, the director would require public notification for each permit before its issuance, and require that the injector periodically show that the well continues to be the best environmental means of disposing of the waste.

This approach would have provided maximum protection of underground drinking water souces within the shortest time frame, and would have been consistent with other Subparts of the UIC regulations. It was not adopted because a substantial effort would have been required to locate individual wells that are typically hidden from view. In addition, it is impossible to argue with certainty that technological alternatives to current practices are economically feasible for all shallow disposal and recharge well practices. Considering the absence of a complete characterization of wells, it is possible that some permit requirements would be established without a thorough understanding of all elements of operations such as volume and toxicity, of injected fluids, costs and alternatives.

The main features of alternative number 2 are:

- The Director would compile an inventory, including number, location, and use of these wells and determine the toxicity and volume of the injected fluids;
- The Director would develop and compile hydrogeologic data such as location of the aquifers, aquifer yield, ground-water quality, ground-water movement and ground-water use;
- The Director would develop data on present and future population and industrialization, emphasizing the dependence upon ground-water and the protection of public health;

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[30] Geraghty and Miller, Inc., *Development of Procedures for Subclassification of Class III Injection Wells.* (April 30, 1980).

[31] *Ibid.*, p. 8.

[32] *Ibid.*, p. VI.

[33] *Ibid.*, p. VII.

[34] *Ibid.*, p. 8.

[35] 40 CFR 146.34(b)(2) and 40 CFR 146.33(b)(3).

[36] 40 CFR 146.10(d).

[37] For a full discussion of these alternatives, see Temple, Barker and Sloane, Inc., *Analysis of Cost. Underground Injection Control Regulations. Class I and Class III Wells. Class IV and Class V Wells.* (May, 1979), Part 2, Appendix B.

- The Director would consider the technological alternatives available to existing practices; and
- The Director would assess the risk to underground sources of drinking water and would submit a State plan to cover new and existing injection wells.

The advantages of this alternative are, the study would be mandatory, being required by regulation; provision could be made for the Director to take action in the event cases of endangerment are uncovered during the course of the study and there would be a greater degree of uniformity in several important aspects of the study, such as scope; methodology; and data quality. The major disadvantages to this approach, which led to its rejection by the Agency, is that it is time consuming and would allow extremely dangerous practices to continue on a widespread basis while the problem was studied further.

The third alternative is similar to the second, except that the study would be voluntary. The same type of information would be collected; however, the alternative would suffer from the same disadvantages as the former alternative. In addition, the Director might not have the authority to ban dangerous practices which are uncovered. Consequently, the Agency rejected this approach as well.

The fourth alternative was selected by EPA. It combines regulation of the most dangerous practices (Class IV) with further study of those believed to be of less immediate concern (generally, those wells in Class V). Under alternative number four, the injection of hazardous wastes directly into an underground source of drinking water after six months following approval or promulgation of any UIC program for a State, is prohibited. The control of injection of hazardous wastes above USDWs is reserved until the Fall.

Cost of Compliance

Most States already regulate the underground injection of fluids in some manner or to some degree. State personnel are already assigned to work on the control of injection wells, and owners and operators of injection wells must meet existing State requirements. Nevertheless, the UIC regulations will cause both States and industry to commit resources to the protection of underground sources of drinking water in addition to their current level of effort.

EPA's best estimate is that these regulations will result in incremental costs of approximately $775 million, expressed in 1977 prices, to all 57 States and Territories and the regulated community in the first five years of program operation (Table 4 provides a summary). This estimate includes costs only for developing and conducting the assessment of Class V wells and does not try to guess the impact of immediate closures or the eventual regulatory requirements. In addition, no attempt was made to anticipate the changed requirements that may result from the mid-course evaluation of the area of review requirement, or from the review of a sample of wells which were permitted on the basis of cementing records. This is because EPA does not have a sufficient basis for projecting the number of wells which will require remedial action.

Table 4.—*Summary of Five-Year Incremental Costs of UIC Regulation*

[In thousands of 1977 dollars]

	Non-recurring	Recurring	Total
Industry:			
Class I	5,025	463	5,488
Class II	565,094	4,006	569,100
Class III	5,698	560	6,258
Class IV	1,100	162,300	163,400
Subtotal	576,917	167,329	744,246
State:			
Class I	875	2,535	3,410
Class II	9,855	7,560	17,415
Class III	709	1,230	1,939
Class IV	389	858	1,247
Class V	7,200		7,200
Subtotal	19,028	12,183	31,211
Total	595,945	179,512	775,457

In this study price levels which existed in 1977 were used to estimate the cost of the UIC program. The use of "constant" prices is a commonly used convention which enables one to ascertain the physical amount of goods and services, or "real" resources, devoted to compliance because it eliminates the influence of changes in prices. For other types of analysis, such as projecting expenditures and revenues in a given year, it would be appropriate to use prices expected to prevail during the time period of interest. If it is desired to express the cost estimates in terms of "current" prices it would be necessary either to project the level of each unit price, or to construct a price index which would be used to convert the aggregate cost estimates from 1977 to other price levels. Such an endeavor is beyond the scope of this analysis. However, in the judgment of EPA's consultant, increases in costs suggest that the annual rate of price level increase for activities associated with oil drilling and production is roughly on the order of 20% per year.[28] Consequently a rough estimate of the cost of the UIC program in general, and Class II in particular, in 1980 prices, may be obtained by adjusting costs upward by 50%. The total cost of the Regulations in 1980 prices would be on the order of $1.2 billion, or about $230 million per year.

It should be emphasized that the estimate is largely a function of the size of the environmental problem. The cost to industry, in 1977 prices, of carrying out the fixed requirements—permit application, permit issuance, inspection, surveillance, monitoring, testing, reporting, etc.[29]—is estimated to be $191 million, or $38 million annually for the first five years. This is, in a sense, the fixed cost of the regulations. The remainder, $553 million, is the estimated cost, in the first five years, of repairing leaky injection wells, replugging wells improperly abandoned in the first place, and re-cementing improperly completed producing wells in the area of review. For Class IV, these costs include the pretreatment of hazardous waste and shipment to approved hazardous waste management facilities. These are the variable costs which directly depend upon the number of problem wells. If the environmental problem is more or less extensive than estimated by EPA in this analysis, this portion of the cost would vary accordingly and potentially widely.

Of the total $775 million estimated cost, about $744 million falls on industry. The total incremental State burden is estimated to be about $31 million over five years or about $6 million annually.

The cost of regulating Class II injection wells, $569 million to industry over five years, clearly dominates both State and industry costs. However, this class also has the largest number of wells (2 million) potentially affected by the regulations.

The following discussion provides details of the cost estimates by class of well. The sections are organized into industry estimates and State estimates. They also discuss nonrecurring and recurring costs. Nonrecurring costs include such one-time activities as inventorying wells in the area of review, taking appropriate remedial action, and repermitting existing wells. Demonstrations of mechanical integrity are also treated as one-time costs because the second round of tests will not take place in the first five year period. Recurring costs include such periodically required activities as monitoring, reporting, and enforcement.

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[28] *In Geraghty and Miller, Inc., Development of Procedures and Costs for Proper Abandonment and Plugging of Injection Wells* (April 30, 1980), p. IV–5, the cost of abandoning a 3,000 foot well used either for oil and gas storage or production is $8,000. In order to estimate the cost of abandonment in 1977 prices, EPA's consultant, Booz, Allen and Hamilton, reduced this to $5,000, which indicates a growth rate of approximately 20% per year *(Underground Injection Control Program Class II Well Incremental Compliance Cost Refinements,* p. 18).

[29] 40 CFR 122.45.

Class I Wells. 1. *Industry Costs.* A demonstration of mechanical integrity will be required of operators but flexibility is provided in the choice of test for demonstrating it. Unit costs can range from $5,000 to $35,000 [30] per test. The total cost of mechanical integrity testing for the UIC program is estimated to be in the range of $675,000 to $4.5 million.[31]

Appropriate remedial work is prescribed for defective wells and may vary from $17,500 to $100,000.[32] Total incremental repair costs for the class are estimated to range from $53,000 to $300,000.[33]

The average number of new wells being constructed each year is estimated at twenty.[34] Since all States now have permitting requirements at least as stringent as the UIC requirements, new construction will incorporate the new design criteria contained in these regulations and no incremental construction costs are expected to result.[35]

Additional reporting requirements have been estimated to cost $300 per well per year for new and existing deep disposal wells.[36] Total recurring costs are estimated to be $463,000 over five years.[37]

2. *State Costs.* The regulations require collection and review of data on a quarterly basis for each site subject to the regulations. Six work-hours per submission per site has been employed in the estimation of costs for this activity.[38] EPA estimates that the submission of reports to the Agency will require one hour of preparation per site per quarter.

The total costs of the requirements in Class I appear in Table 5. The increase in industry and state costs since the proposed regulations is due to a revision in the number of existing wells, based upon a new survey of the well population.[39]

Class II Wells. Class II wells include injection wells associated with oil and gas production, and hydrocarbon storage, except gaseous natural gas storage wells. The conceptual scheme for estimating incremental costs involves the identification of unit costs for the activities required by the proposed regulations and multiplying those by the estimated number of wells requiring each kind of action. Several changes have been made to the cost of compliance based upon comments received and further analysis performed by EPA. On net balance cost to operators is lower than the previous estimate, primarily due to lower costs of remedial action. This results from the recognition that certain wells will be abandoned rather than repaired. A reconciliation of changes in costs from those appearing in the April 20, 1979, Preamble follows:

Table 5.—*Incremental Five Year Program Costs, Class I Wells*

[In thousands of 1977 dollars]

	Nonrecurring	Recurring	Total
Industry:			
Mechanical Integrity Test	675–4, 725		675–4,725
Remedial Action	53–300		53–300
Monitoring and Reporting		463	
Subtotal	728–5,025	463	1,191–5,488
State:			
Program Development	52–127		52–127
Program Hearings	39		39
Permit Existing Wells	298–593		298–593
Permit Hearings	116		116
Quarterly Review		545	545
Quarterly Report		130	130
Annual Report		50–245	50–245
Enforcement		830–1,615	830–1,615
Subtotal	505–875	1,555–2,535	2,060–3,410
Total	1,233–5,900	2,018–2,998	3,251–8,898

Source: Temple, Barker and Sloane, Inc., *Underground Injection Control Regulations. Analysis of State Program Costs: Class I Wells.* (May 15, 1980) p. 6.

1. *Sampling for fluid migration (+$4.5 million).* The proposed regulations permitted the submission of cementing records as a demonstration of mechanical integrity. However, EPA's contractor advised the Agency that "existing well records have limited use in determining the adequacy of the cement sheath outside of a well casing".[40] For certain existing Class II wells, the absence of fluid migration will be based on well records. A sample of these wells will be tested in order to ascertain if reliance upon well records was adequate as an indicator of the mechanical integrity of the well. The costs of this requirement are based upon a sample of 3,000 injection wells nationwide.

2. *Initial reporting of test results—existing enhanced recovery wells (+$2.5 million).* In the case of new injection wells and existing disposal wells test results are reported in the permit application. However, existing enhanced recovery injection wells may be covered by rule, but no provision was made for reporting test results to the State Director. This omission has been corrected by attributing to operators of wells covered by rule, a cost of $25 per report.

3. *Financial responsibility (+$5.0 million).* The April 1979 reproposal did not include the cost, to operators of existing enhanced recovery wells, of securing a well closure bond. Costs for such wells were estimated in the same fashion as costs for existing disposal well operators.

4. *Unit permitting cost (+$2.2 million).* In EPA's earlier analysis the unit cost of permit application used in table XIV–1 [41] to calculate the five-year cost to industry was inconsistent with the unit cost which should have been used, as calculated in Chapter XI.[42] Previously the cost for permitting new salt water disposal (SWD), new enhanced recovery and existing SWD wells was $620; $367 and $240, respectively. The correct unit costs are $675; $422 and $262, respectively.

5. *Changes accruing to well closure and injection wells not put in service ($−92.8 million).* In EPA's earlier estimate it was assumed that wells would either be repaired, or abandoned and redrilled, depending on the type of well. In the current analysis the results of the production impact analysis have been integrated into the cost analysis.[43] The cost model now recognizes that the predicted number of new enhanced recovery (ER) wells will be reduced by 2,470 as a result of the evaluation of the area of review. It is estimated that the

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[30] Temple, Barker and Sloane, *op.cit.*, Part I, p. II–10.

[31] Geraghty and Miller, Inc., *Economic Analysis, Class I Rehabilitation.* (April 30, 1980).

[32] Temple, Barker and Sloane, *op.cit.*, Part I, p. II–11.

[33] Geraghty and Miller, *op.cit.*, Part I, p. II–5.

[34] Temple, Barker, and Sloane, *op.cit.*, Part I, p. II–5.

[35] Ibid., Part I, p. II–12.

[36] Ibid., Part I, p. II–12.

[37] Geraghty and Miller, *op.cit.*, p. 14.

[38] Temple, Barker and Sloane, *op. cit.*, Part I, p. III–6.

[39] Geraghty and Miller, *op. cit.*, p. 9.

[40] Geraghty and Miller, Inc., *Mechanical Integrity Testing of Injection Wells.* (April 30, 1980), p. 9.

[41] Arthur D. Little, Inc., *Cost of Compliance. Proposed Underground Injection Control Program. Oil and Gas Wells. (June, 1979), p. 196.*

[42] *Ibid.*, p. 159.

[43] Booz, Allen and Hamilton, *op. cit.*, pp. 16 ff.

evaluation will show (1) a producing well needing remedial action; (2) an abandoned well requiring reabandonment; or (3) both (1) and (2). It is judged that the anticipated production will not warrant the required expenditures to repair an estimated 2,220 abandoned wells and 86 producing wells. The operator will therefore choose not to place the new ER wells in service, thereby avoiding the cost of remedial action to wells in the area of review. Savings, relative to EPA's earlier costs estimate, amount to $70.8 million. Similarly, forty new (i.e., converted) ER wells will require remedial action but will be abandoned rather than repaired. This reduces EPA's earlier cost estimated by $1.0 million.

EPA estimates that fifteen new salt water disposal wells will not be placed in service due to the need to repair both a producing and abandoned well in the area of review. Fifteen abandoned wells and a like number of producing wells will not be repaired, resulting in a reduction of $750 thousand from EPA's earlier estimate.

In addition, (a) 590 existing ER and 500 existing SWD wells will be abandoned rather than repaired. When the cost of abandoning the injection and associated producing wells is taken into account, the "savings" over EPA's earlier cost estimate is estimated to be $18.9 million; and (b) seventy five existing SWD wells will be abandoned rather than repaired, at a net "savings" of $150,000.

Finally, the abandonment of wells and decision not to put new injection wells into service results in savings in the cost of permitting, reporting the results of mechanical integrity tests and obtaining plugging bonds. These "indirect" savings total $1.2 million.

Table 6 shows a reconciliation of the earlier Class II cost estimate and the current one. In all cases where a well was abandoned rather than repaired, the cost of its abandonment was properly considered in the calculation of the "savings" over EPA's prior cost estimate.

1. *Industry Costs.*—Incremental non-recurring costs of compliance to operators are estimated to be $565 million over the first five year period. Of this total $20 million are for the preparation of permit applications, and $149 million are the cost associated with determining the nature and extent of corrective action. The bulk of these costs, $396 million, is the estimated cost of the corrective work itself.

Table 6.—*Reconciliation of Current and Previous Class II Industry Costs*

[Thousands of 1977 dollars]

1. April, 1979 estimate [1]	$647,000
2. Alaska	+700
3. Initial reporting of test results for existing ER wells	+2,500
4. Plugging bond, existing ER wells	+5,000
5. Correction, unit cost of permitting	+2,200
6. Random sampling for fluid migration	+4,500
7. Production impact analysis	−192,800
8. Current cost estimate	569,000

[1] Arthur D. Little, Inc., Cost of Compliance. Proposal Underground *Injection Control Program. Oil and Gas Wells.* (June, 1979) pp. 196–200. Includes recurring costs.

Source: Booz, Allen and Hamilton, Inc., *Underground Injection Control Program Class II Well Incremental Compliance Cost Refinements.* (April 30, 1980), p. 33.

In estimating the cost of corrective action the unit cost of reabandoning a well was taken as $20,000. EPA reviewed the validity of this estimate since the proposal by surveying costs of reabandonment experienced by operators and state regulatory agencies between 1975 and 1979 in Louisiana, Michigan and Texas. After adjusting for changes in price levels EPA's consultant concluded that $20,000 represented a reasonable average of the considerable range of unit costs uncovered by the survey.[44]

On the average, industry will experience one-time costs of some $113 million per year over a five-year period. These estimates assume the current requirements for Class II and do not try to anticipate the outcome of the mid-course evaluation regarding the area of review requirement.

In addition to the one-time costs associated with existing wells, there are incremental costs which producers will incur each year to collect and report monitoring data. The total recurring costs attributable to the regulation are estimated at $4 million over five years or about $800,000 per year. (Table 7).

A note of caution is warranted regarding the correct interpretation of the costs to Class II operators. First, it was assumed in the estimating methodology that the area of review would be ¼ mile in all cases. EPA believes that this assumption results in an overstatement of industry costs because the area of review, when calculated by a mathematical formula as permitted by the regulations, will probably be substantially less than ¼ mile in most cases. This means that the number of producing and abandoned wells subject to testing, correction and reporting requirements is substantially less than the number ascertained through the use of the ¼ mile assumption.

Table 7.—*Incremental Five-Year Costs to Producers, Class II Wells*

[Thousands of 1977 dollars]

NON-RECURRING:	
Evaluation of Construction:	
Previously Abandoned Wells	12,800
Producing Wells	28,200
Injection Wells*	108,500
Subtotal	149,300
Corrective Action:	
Previously Abandoned Wells	258,100
Producing Wells	38,500
Injection Wells	85,400
Abandon injection wells and associated producing wells	13,800
Subtotal	395,800
Permit Application	20,100
Subtotal, non-recurring	565,200
RECURRING:	
Monitoring and Reporting	4,000
Total	569,000

*Includes plugging bond for existing enhanced recovery wells.

Note.—Does not add to total due to rounding.

2. *State Costs.*—The estimate of the incremental costs to States, of implementing the proposed UIC control program for Class II, is based on an estimate of the total effort that will be required in oil-producing States to enforce the proposed Federal regulations. The amount currently spent on UIC programs by these States was then subtracted from the total, yielding the incremental costs.[45]

It is estimated that oil-producing states will incur total costs of $38 million over a five year period. Of this, $16 million will be one-time costs to re-permit existing disposal wells and other start-up costs. The remaining $22 million will cover the permitting of new wells, monitoring and enforcement, and general overhead. Since current State spending projected for five years equals $20.7 million, incremental costs over five years are $17 million or $3.5 million annually (Table 8).

Class III Wells. Special process mining is, in most instances, a developing technology already operating under some State controls. There are about 8,000 wells but a relatively small number of sites at the present time.[46] Consequently, the costs of compliance are estimated to be small and the impact on the industry to be negligible.

Table 8.—*Incremental Five-Year Costs to States, Class II Wells*

[Thousands of 1977 dollars]

Non-recurring:	
Ground Water Inventory	2,174
Permit Existing Disposal Wells	7,810
Permit New Wells	4,505
Other	2,072
Subtotal	16,560

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[44] Booz, Allen and Hamilton, *op. cit.*, p. 11.

[45] Arthur D. Little, Inc., *op. cit.*, p. 183.

[46] Geraghty and Miller, *op. cit.*, p. 4.

Table 8.—*Incremental Five-Year Costs to States, Class II Wells*—Continued

[Thousands of 1977 dollars]

Recurring:	
Overhead	5,590
Enforcement	13,802
Monitoring Reports	2,203
Subtotal	21,595
Total State Cost	38,155
Less: Current State Spending	−20,740
Total Incremental State Cost	17,415
Recurring	7,650
Non-recurring	9,855

Source: Arthur D. Little, Inc., *Cost of Compliance. Proposed Underground Injection Control Program. Oil and Gas Wells.* (June, 1979), p. 193, and U.S. Environmental Protection Agency, *Class II State Cost* (May, 1980).

1. *Industry Costs.*—The total incremental cost to industry of complying with Class III requirements is estimated to be $6.3 million for the first five years, or about $1.3 million annually. Of this, about $5.7 million are nonrecurring costs mainly associated with the test for mechanical integrity and repair of faulty wells. The remaining half-million dollars are the cost of monitoring and reporting.[47]

The States of Texas and Louisiana account for all current Frasch process sulfur mining. There are ten mine fields with approximately 500 wells in the two States. The average useful life of a Frasch well is about one year. Since this practice was started eighty years ago, approximately 35,000 wells have been drilled.[48]

The total one-time permitting expenses for the ten fields will be approximately $34,000, and reporting costs, $15,000 over five years.

There are eighty operating salt solution mining sites in the United States, principally in Texas, Louisiana, Michigan, New York, Ohio, and Kansas, containing approximately one thousand wells. Permit applications expenses for the thirty fields are estimated to total $204,000 and incremental annual reporting requirement expenses are estimated at $165,000 over five years. The total one-time cost of mechanical integrity testing is estimated to be one-half million dollars.

One operating field with 18 wells (17 injection and one extraction) for the solution mining of potash exists in Moab, Utah.[49] Permit application requirements for the site will involve a one-time cost of $30,000.[50] There will be no costs for integrity testing of the injection wells, as all abandoned wells in the field are thought to be adequately plugged.[51] Therefore no cost will be incurred by the operator for reviewing nearby wells. There will be recurring incremental costs of $100,000 for reporting over a five year period.

Summaries of the one-time costs and annual recurring costs to industry are presented in Table 9.

2. *State Costs.*—The regulations require collection and review of data on a quarterly basis for each site subject to the regulations. Seven hours per submission per site has been employed in estimating state costs. The submission of an annual report to EPA will require 3 to 35 work days per State to comply with the regulations, depending on the number of permits issued, quarterly reports reviewed, and other regulatory activities.

Table 9.—*Incremental Five-Year Costs to Industry, Class III*

[In thousands of 1977 dollars]

	Permitting	Mechanical integrity test	Monitoring wells	Remedial action	Total
Non-recurring:					
In-situ gasification	10	0	0	0	10
Uranium leaching	60	0	0	0	60
Geothermal	10	0	0	0	10
In-situ copper leaching	31	0	300	0	331
Frasch sulfur mining	34	0	0	0	34
Solution mining of salt	204	519	3,000	1,500	5,223
Solution mining of potash	30	0	0	0	30
Subtotal	379	519	3,300	1,500	5,698

	Monitoring	Reporting	Total
Recurring:			
In-situ gasification	0	11	11
Uranium leaching	0	53	53
Geothermal	0	9	9
In-situ copper leaching	18	9	27
Frasch sulfur mining	0	15	15
Solution mining of salt	180	165	345
Solution mining of potash	0	100	100
Subtotal	198	362	560
Total	N/A	N/A	6,258

N/A = Not Applicable.

Source: Environmental Protection Agency. *Class III Cost Analysis.* (May 1980).

The State program costs for all States to comply with this Subpart of the regulations are estimated to be $1.9 million over five years as shown in Table 10.

Class IV Wells. Until an underground injection facility receives an UIC permit issued pursuant to the Safe Drinking Water Act it is subject to the interim status requirements of the Resource Conservation and Recovery Act.[52] The Agency adopted this approach because the UIC program does not have the equivalent of an interim status period when owners or operators who dispose of hazardous waste by underground injection are subject to Federally enforceable standards. Enforcement of environmental controls under the UIC program must await: the development by states of programs for primary enforcement responsibility; the approval or disapproval of those programs by EPA; and the development of UIC programs by EPA in States which fail to develop and implement adequate programs for primary enforcement responsibility. EPA does not believe that UIC primary enforcement programs will be in place in all States on the effective date of these interim status regulations. Therefore, in order to provide control over underground injection of hazardous waste during the interim status period, as contemplated by RCRA, it is necessary to regulate underground injection under 40 CFR 265, Subpart R.

Table 10.—*Incremental Five-Year Costs to States, Class III Wells*

[In thousands of 1977 dollars]

	Total
Non-recurring:	
Developing state programs	72
Program hearings	23
Permitting existing sites	536
Permit hearings	78
Subtotal	709
Recurring:	
Quarterly Review	285
Annual Report	130
Enforcement	815
Subtotal	1,230
Total	1,939

Source: Environmental Protection Agency. *Class III Cost Analysis.* (May 1980).

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[47] Environmental Protection Agency, *Class III Cost Analysis* (May, 1980).

[48] Temple, Barker and Sloane, *op. cit.*, Part I, p. II-23.

[49] *Ibid.*, Part I, p. II-27.

[50] *Ibid.*, Part I, p. III-6.

[51] *Ibid.*, Part I, p. III-8.

[52] 45 FR 33176

Once an UIC program is promulgated by a state, Class IV wells which inject hazardous waste directly into an underground source of drinking water will be prohibited.[53] This prohibition is effective six months after the affective date of the program. Requirements for Class IV wells which inject above an underground source of drinking water are reserved.

Preliminary analysis, based on limited field work, suggests that there are between 5,000–10,000 wells that will meet the definition of Class IV. The "best estimate" is 7,500 wells.

In estimating costs EPA's consultant based its analysis on the expectation that large disposers—those injecting more than one thousand gallons per day—will pretreat their waste stream to remove the hazardous components, then transport the sludge to an off-site facility. Small disposers it is assumed, will transport the entire waste stream without prior treatment.[54] In revising the cost estimate to conform with the promulgated regulations EPA followed this convention.[55] In addition, EPA included costs for monitoring of injection fluids and quarterly reporting to the Director in order to present the costs of a comprehensive regulatory program. Such monitoring and reporting is not now required, but under consideration. To illustrate, one of the options for which the Agency has requested comments, in connection with permitting standards for hazardous waste management facilities, would require a demonstration that the anticipated impact upon groundwater" * * * will not adversely affect the health of persons or violate NPDWR based on the following information:

> Injection volume and pressure * * *
> Direction of ground water flow * * *
> Monitoring up-gradient and down-gradient." [56]

It is expected that the cost to industry in the first five years of program operation will total $163 million. State costs are estimated at $1.2 million over this period.[57]

Class V Wells. Generally, wells falling into this class inject nonhazardous fluids into or above formations that contain underground sources of drinking water. Owners or operators of such wells are to notify the Director of the existence of any well under his control meeting the definition of Class V, and submit certain information within one year of the effective date of the UIC program. Within three years of such effective date the Director is to: submit certain information; assess the contamination potential of Class V wells; assess the available corrective alternatives and their environmental and economic consequences; and make recommendations for the most appropriate regulatory approaches and for remedial actions, where appropriate.[58]

Nonrecurring State costs for Class V wells are related to establishing the assessment program while annual costs relate to compiling, categorizing and analyzing the information collected. It is estimated that this effort will cost $5.2 to $7.2 million over a five year period.

Production Impact

Class II

EPA followed a seven step approach to the estimate of the impact of the Regulations on oil production.[59]

1. Determine the cost of compliance for each event combination.
2. Calculate the break-even point for each event combination.
3. Calculate the probability for each event combination.
4. Determine the expected value of fraction of wells shut down or unrealized, i.e., those producing below break-even point.
5. Determine the expected value of fraction of production lost due to shut down/unrealized wells.
6. *Number of wells shut down* = total number of wells under regulation × (sum of expected values of fraction of wells shut down/unrealized.
7. *Lost production* = total production from wells under regulation × (sum of expected value of fraction of lost production).

Previously, EPA estimated that approximately 12,000 barrels of oil per day would not be produced as a result of the regulations.[60] In the interim EPA's contractor reviewed the analysis and made several important changes.[61] First, the profit per barrel was revised from four to six dollars because the rapidly increasing price of crude oil rendered the earlier profit figure obsolete. Second, the capital recovery period was revised from ten years for all wells, to one and one-half years for new ones, and three for existing wells, to more accurately reflect current industry practice. This change represents a substantially more stringent assumption regarding the required profitability of associated producing wells when evaluated against the cost incurred in compliance with the Regulations. Third, the discount rate used in the calculation of the present value of future profits was increased from 10% to 13%. Again, this represents a more stringent criterion for determining whether the expenditure of funds in compliance with the Regulations is justified on the basis of future profits. All of the changes except that relating to profits tended to increase the impact on production compared to EPA's previous estimate.

The combined effect of those changes was to increase the estimate of production loss from 12,000 to 13,300 barrels per day (BPD).[62] The impact associated with each category of injection well is presented in Table 11. It is to be noted that the estimate of lost production is closely tied to profit rates, the distribution of profit per barrel among wells, and payback period. If profits are assumed to increase from six to ten dollars per barrel, which EPA believes to be a reasonable assumption, the estimated loss in production attributable to the regulations declines from thirteen thousand to five thousand BPD.[63] If, instead of applying a uniform profit of $6 per barrel, it is assumed that one-third of all wells earn $4 per barrel and two-thirds earn $10 per barrel, the loss in oil production increases from thirteen thousand to twenty thousand BPD.[64] If the required payback period is decreased from one and one-half to one year for new wells, and from three to two years for existing wells, the loss in production amounts to 29,000 BPD.[65]

Table 11.—*Production Loss Related to Type of Injection Well Subject to Regulation*

Type of well	Injection wells		Associated producing wells		Associated production loss (thousands BPD)		
	Shut-in	Not put into service	Shut-in	Not coverted to enhance recovery	Shut-in wells	Enhanced recovery not put into service	Total
Existing enhanced recovery	1,090		1,090		2.4		2.4
Existing salt water disposal	75		300		.4		.4
New enhanced recovery	40	2,470		2,510		10.3	10.3
New salt water disposal		15		60		.2	.2
Totals	1,205	2,485	1,390	2,570	2.8	10.5	13.3

Source: Booz, Allen and Hamilton, *Reestimation of Impacts of Proposed Underground Injection Control Regulations on Crude Oil Production.* (April 30, 1980), p. III-4.

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[53] 40 CFR 122.36.

[54] *Ibid.*, Part II, p. III-6.

[55] U.S. Environmental Protection Agency. *Class IV Cost Analysis* (May 1980).

[56] 45 FR 33332.

[57] Environmental Protection Agency. *Class IV Cost Analysis* (May 1980).

[58] 40 CFR 146.51; 40 CFR 146.52.

[59] Booz, Allen and Hamilton, Inc., *Re-estimation of Impacts of Proposed Underground Injection Control Regulations on Crude Oil Production.* (April 30, 1980), Attachment 3, p. 11.

[60] 44 FR 23 758, April 20, 1979.

[61] Generally, Booz, Allen and Hamilton, *Re-estimation of Impacts . . .*, p. III-3.

[62] *Ibid.*, p. III-2.

[63] *Ibid.*, p. III-3.

[64] *Ibid.*, p. III-8.

[65] *Ibid.*, p. III-3.

In the aggregate the regulations are expected to have little effect on profits, prices, production, or employment. Imported oil prices are determined by the Organization of Petroleum Exporting Countries (OPEC), and domestic "new" oil is priced accordingly. With the expiration of controls on "old" oil in 1981, all domestically produced oil will be priced according to OPEC levels. Therefore it is reasonable to expect that the cost of compliance will be absorbed by oil firms.[66] In 1977 revenues of the oil industry were $32.5 billion.[67] The average annual cost of $113 million attributable to the regulations represents about one third of one percent of total revenues.

Based upon overall output per employee productivity figures, the loss of 13,300 barrels per day suggests a maximum potential reduction in employment of 600 employees. In practice the number of positions actually eliminated may approach zero, for two reasons: First, almost all of the lost production accrues to future wells not put into service. Since they are not yet in existence there are no existing jobs eliminated. Second, the remaining lost production of 2,700 BPD is distributed among fifteen hundred producing wells. Considering the widely dispersed impact it appears that few, if any, current jobs will be lost.[68]

On a regional level the impact will be more variable. In general, regions with (1) a higher proportion of stripper wells, (2) wells producing at a relatively low output, (3) a large number of abandonments, and (4) poor completion and abandonment practices, will be affected more than regions not so characterized. Based upon these types of considerations it appears that the impact of the regulations will be felt to a greater extent in the Illinois and Appalachian Basins. The least likely regions to experience an impact are the Rocky Mountain and the Gulf Coast. Between these extremes will fall California, East Texas and the Permian Basin.[69]

Class III [70]

The potential impact of the regulations is not expected to be significant, for the following reasons:

(1) For most industries the production from the sites subject to the regulations account for only a small proportion of domestic supply;

(2) For salt and Frasch sulfur production, compliance costs are relatively small; and

(3) Firms engaging in solution mining are diversified.

No loss of employment is expected to be caused by compliance with the regulations.

Reporting Impacts

Reporting requirements apply to all permit holders under Classes I and III, and to owners or operators of wells authorized by permit or rule under Class II. Owners or operators of Class II wells are to report once each year, while owners or operators of Class I and III wells are to report quarterly. Although not presently required, reporting costs have also been estimated for Class IV operators, as discussed earlier.

Total annual costs to owners and operators of Class I, II, and III wells are estimated to be $468,000. Owners and operators of Class IV wells are estimated to incur costs in the first year only of approximately $600,000 in submitting monitoring reports. They will not incur reporting costs beyond the first year because these wells are banned after six months from the time the UIC program becomes effective.

The State will review these reports. It will, in turn, make three types of reports to EPA: (1) Quarterly reports on the compliance status of major facilities (Classes I and IV) once the State program is effective; (2) annual reports on the operation of its program; and (3) "mid-course correction" reports, as described in the following section on program evaluation.

Annual State costs for the review of monitoring data for Classes I, II, and III, and for the submission of the quarterly and annual reports to EPA, are estimated to be about $1.0 million per year. These are recurring annual costs and do not include a cost of $221,000 incurred by the States during the first year only, to review Class IV monitoring reports. It is expected that the mid-course correction reports will require an insignificant amount of time to prepare, and no cost has been included for them.

EPA will review the quarterly and annual reports from the 57 jurisdictions at an estimated cost of $18,000 per year.

In summary, reporting costs during the first five years of program operation total $8.2 million, as follows:

- Owner/operators, $2.9 million.
- States, $5.2 million.
- EPA, $90 thousand.

Reporting costs are presented in additional detail in Table 12.

Evaluation Plan

In the preamble to the reproposed regulations,[71] EPA summarized its plan for evaluation of the UIC program and indicated it would provide a more detailed plan on promulgation. The discussion below summarizes the Agency's plan in this area.

EPA would like to be able to target the UIC requirements to those well types and geologic, geographic or hydrologic conditions, that have the greatest potential for groundwater contamination. EPA will evaluate the program and, based on its findings, may adjust the requirements of the UIC program.

Table 12.—*Reporting Costs*

	Well class			
	I	II	III	IV
Well owner/operator:				
Reporting monitoring data:				
Reporting frequency per year	4	1	4	4
Unit time (hours)	8	1	8–16	4
Unit cost (dollars)	75	11–18	75–150	40
Number of wells/sites	[1] 309	25,200	142	[2] 7,500
Total cost per year ($ thousands)	23	378	67	[1] 600
State:				
Review monitoring reports:				
Number reviewed per year	1,236	25,200	568	[2] 15,000
Unit time (hours)	6	1	7	1
Unit cost (dollars)	90	18	105	15
Total cost per year ($ thousands)	111	454	60	[2] 221
Quarterly report to EPA on compliance status:				
Number submitted per year	96	n.a.	n.a.	114
Unit time (hours)	18	n.a.	n.a.	40
Unit cost (dollars)	270	n.a.	n.a.	600
Total cost per year ($ thousands)	26	n.a.	n.a.	68
Annual report to EPA on program operation:				
Unit time (hours)	30–140	160	108	160
Unit cost (dollars)	450–2,100	2,400	1,625	2,400
Total cost per year ($ thousands)	10–40	77	26	137

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[66] Booz, Allen and Hamilton, *Underground Injection Control Program. Industry Analysis of Class II and Class III Well Regulation.* (April 30, 1980), p. III–3.

[67] *Ibid.*, p. II–12.

[68] Booz, Allen and Hamilton. *Underground Injection Control Program. Industry Analysis* . . . (p. IV–2).

[69] *Ibid.*, p. 2; IV–4.

[70] *Ibid.*, p. III–14 ff.

[71] 44 FR 23752, April 20, 1979.

'able 12.—*Reporting Costs*—Continued

	Well class			
	I	II	III	IV
Environmental Protection Agency:				
Review of quarterly report on compliance; siting:				
Number received	96	n.a.	n.a.	114
Unit time (hours)	4	n.a.	n.a.	4
Unit cost (dollars)	40	n.a.	n.a.	40
Total cost per year ($ thousands)	4	n.a.	n.a.	5
Review of Annual Report on Program Operation:				
Number reviewed	24	32	16	57
Unit time (hours)	4	16	4	4
Unit cost (dollars)	40	160	40	40
Total cost per year ($ thousands)	1	5	1	2

The average number of wells in States which do not presently require reporting.

Only two reports will be submitted since it is assumed that all injections of hazardous waste ceases within six months. Hence, there are no Class IV reporting costs to injectors after the first year.

n.a.—Not applicable.

The Agency evaluated two approaches for directly measuring the improvement in ground-water quality that would result from implementation of the UIC program and concluded that neither was a viable method of evaluating the program. The first approach was based on the drilling of monitoring wells in the immediate vicinity of a random sample of injection wells to determine the ambient ground-water quality. Because the expected failure rates (i.e., the fraction of wells expected to fail a mechanical integrity test) are small (estimated at 2–3% for Class II wells, for example) large sample sizes would be needed to measure the effect reliably. It was estimated that the Agency would need to sample 200 injection wells to measure the failure rates and a much larger sample, perhaps 1,000, to make inferences about what categories of wells are most likely to fail. Using the conservative assumption that at least two monitoring wells would generally be needed for each injection well, and that the cost of drilling a monitoring well would be on the order of $20,000, the total costs for the well drilling alone would be $8 million to sample 200 injection wells and $40 million to sample 1,000 wells. In addition to its extremely high cost, this approach has two other serious drawbacks. It provides no information on the effect of nearby wells in the area of review on groundwater or on the effectiveness of the UIC program in abating pollution from these wells. It also would not provide valid data on the effectiveness of the UIC program in ensuring that leaking injection wells are repaired. To obtain data on ground-water quality before and after program implementation, the sample on which the evaluation would be based would have to be drawn and known to the program managers before the program takes effect. There would, therefore, be no way to ensure that the treatment of the sampled injection wells was representative of the State programs as a whole. For these reasons, this approach was rejected.

The second direct approach that EPA evaluated is based on analysis of water from existing water wells (or other wells, such as existing monitoring wells) that happen to be located near injection wells. If a sample of such wells showed a significantly higher rate of contamination, for example by salinity, than a sample of wells further from injection wells, one could conclude that the injections wells were likely to be a cause of contamination. Similarly, if the rate of contamination were reduced after implementation of the UIC program, one could conclude that it had been effective. This approach would avoid the necessity of drilling monitoring wells, but it suffers from a number of serious drawbacks which have led EPA to reject it as well. First, it would be necessary in each case to perform a ground-water modeling exercise to determine whether contamination, if it existed, would have reached a given water well. Methods and data to do this routinely with sample sizes of hundreds or thousands do not exist. Second, we would not know when the contamination might have begun, so we would not know how far the plume of contamination would have traveled even if we have an adequate ground-water flow model for the area. Third, existing water wells would in many cases not be drawing from the depths and strata which may have been contaminated. Fourth, where contamination has in fact reached a water well, the well might well have been closed down without an adequate record, introducing an inherent bias. Fifth, it would be impossible to distinguish between contamination from an injection well and contamination from a nearby brine pit (perhaps abandoned). Sixth, it is not clear whether the population of injection wells with water wells located nearby is statistically representative of injection wells as a whole.

EPA also evaluated the possibility of using surface resistivity methods as part of an evaluation scheme to determine from the surface whether contamination had occurred. The evaluation included a field test of the method in an area where contamination by a Class II well had been alleged. EPA concluded that, at its present stage of development, the results of the method are not clear enough for routine use in a broad scale evaluation.

Because of the lack of valid and feasible means of evaluating the effect of the UIC program directly on ground-water quality, EPA has been forced in its evaluation plans to rely on an indirect set of measures of the need for and the effectiveness of the program. EPA will use the observed failure rates as its major evaluation tool. EPA will evaluate these failure rates and, based on its findings, make appropriate changes in the regulations.

Any such changes would be accomplished through amendments of these regulations and would involve full opportunity for public comment. EPA also would expect that the implementation of the UIC program would lead to an increased public awareness of the potential impacts of well injection on groundwater and hence to an increase in the number of reported cases of alleged contamination and to investigation and resolution of these incidents, thus improving the available data base on the direct impacts of injection wells on ground-water quality.

In addition to analysis of failure rates, EPA will also evaluate the administrative effectiveness of the program—whether permits are being issued as required, whether corrective action is in fact occurring when problems are discovered, and so forth.

The mechanisms which EPA will use to carry out these evaluations are the following:

For Classes I, II, III, IV, and V. Quarterly or annual reporting is required of both the owners and operators of wells and the States with primary enforcement responsibility for the program. This periodic reporting will allow the periodic assessment of the efficiency of the program in terms of whether the permits are being issued on such schedule, what the rate of permit violations are and whether the rates are increasing or decreasing, and whether State programs are performing adequately as measured by the conditions of State primacy.

In addition, the following will be required for specific categories of wells:

For injection wells in Classes I, II, and certain Class III wells, the regulations' major requirements are periodic mechanical integrity tests and evaluation of wells in the area of review. EPA will conduct a "mid-course" evaluation of these two requirements on an ongoing basis as the Agency collects data from the States based on the first two years of program operations. The evaluation will provide information on the potential environmental problem posed by injection wells lacking mechanical integrity and by abandoned and producing wells that penetrate the zone of endangering influence associated with injection wells. It will also yield information on the costs and benefits of corrective action and analyze alternatives to the current requirement.

For other categories of Class III wells, the scheme presented above is not appropriate because the applicable regulatory requirements are quite different; these will be evaluated on a case-by-case basis.

For Class IV wells, EPA's evaluation will center on whether such wells are in fact identified and phased out when this is required by the regulations.

Evaluation of the UIC program's effectiveness with respect to *Class V wells* is premature at this time.

EPA considered several alternatives on the timing of the data submission and for "mid-course" evaluation of the requirement for mechanical integrity testing and for the area of review. The considerations that were balanced included the burden on the States in supplying the data, the desire to make any needed corrections in the regulations as quickly as possible, and the need for a sufficiently large and representative sample of data. The reproposal provided for submission of data after the first year of operation of the State programs. Concern developed, however, that one year's operation might be an arbitrary limit. It would be unrepresentative because it is too short for two reasons: (1) Practical experience with program implementation indicates that an initial period of time is required during which both program staff and the regulated community gains experience with the new procedures and requirements; and (2) because five years are allowed for mechanical integrity tests for existing injection wells (where required), it is likely that relatively few of these actions will occur in the first year. Conversely, one year's operation may not provide enough data with which to conduct a statistically valid evaluation of the area of review and mechanical integrity portions of the regulation.

The Agency, therefore, selected an alternative which it believes is an appropriate compromise. The requirements for the evaluation of the major provisions applicable to Classes I, II, and certain Class III wells are specified in 40 CFR 122.18(c)(4)(ii) and 146.

The State Director is to submit this data during the first two full years of operation of the State program, at six-month intervals. The data is to include information on the hydrogeological environment, the numbers and types of wells in the area of review and any remedial action required by the Director, and the results of mechancial integrity tests conducted pursuant to the regulations.

This alternative ensures the data will cover a representative period of program operation and also enable EPA to begin to develop data analysis procedures and to draw appropriate conclusions about program effectiveness as soon as it gets a large enough sample of data.

The Agency originally proposed to apply the evaluation of mechancial integrity and area of review requirements solely to Class II wells because it was here that major questions about the requirements had been raised. After further consideration, the Agency decided to evaluate the requirements for Class I and certain Class III wells for which the requirements are similar.

OMB Review

The sections of these regulations pertaining to recordkeeping and reporting will be submitted to the Office of Management and Budget for review in light of the requirements of the Federal Reports Act, 44 U.S.C. Sec. 3501 *et seq.*

(Secs. 1421, 1422, 1423, 1431, 1445, 1447, 1450, Safe Drinking Water Act, as amended, 42 U.S.C. 300(f) et seq.)

Douglas M. Costle,

Administrator.

June 17, 1980.

Part 146 is added to Title 40 to read as set forth below:

PART 146—UNDERGROUND INJECTION CONTROL PROGRAM: CRITERIA AND STANDARDS

Subpart A—General Provisions

Sec.
146.01 Applicability and scope.
146.02 Law authorizing these regulations.
146.03 Definitions.
146.04 Criteria for exempted aquifers.
146.05 Classification of injection wells.
146.06 Area of review.
146.07 Corrective action.
146.08 Mechanical integrity.
146.09 Criteria for establishing permitting priorities.
146.10 Plugging and abandoning Class I-III wells.

Subpart B—Criteria and Standards Applicable to Class I Wells

146.11 Applicability.
146.12 Construction requirements.
146.13 Operating, monitoring and reporting requirements.
146.14 Information to be considered by the Director.
146.15 Mid course evaluation requirements.

Subpart C—Criteria and Standards Applicable to Class II Wells

146.21 Applicability.
146.22 Construction requirements.
146.23 Operating, monitoring, and reporting requirements.
146.24 Information to be considered by the director.
146.25 Mid course evaluation requirements.

Subpart D—Criteria and Standards Applicable to Class III Wells

146.31 Applicability.
146.32 Construction requirements.
146.33 Operating, monitoring and reporting requirements.
146.34 Information to be considered by the Director.
146.35 Mid course evaluation requirements.

Subpart E—Criteria and Standards Applicable to Class IV Injection Wells

Subpart F—Criteria and Standards Applicable to Class V Injection Wells

146.51 Applicability.
146.52 Inventory and Assessment.

Authority: Secs. 1421, 1422, 1423, 1431, 1445, 1447, and 1450 of the Safe Drinking Water Act, as amended, 42 U.S.C. 300(f) et. seq.

Subpart A—General Provisions

§ 146.01 Applicability and scope.

(a) This Part sets forth technical criteria and standards for the Underground Injection Control Program. This part should be read in conjunction with 40 CFR Parts 122, 123, and 124 which also apply to UIC programs. 40 CFR Part 122 defines the regulatory framework of EPA administered permit programs. 40 CFR Part 123 describes the elements of an approvable State program and procedures for EPA approval of State participation in the permit programs. 40 CFR Part 124 describes the procedures the Agency will use for issuing permits under the covered programs. Certain of these procedures will also apply to State-administered programs as specified in 40 CFR Part 123.

(b) Upon the approval, partial approval or promulgation of a State UIC program by the Administrator, any underground injection which is not authorized by the Director by rule or by permit is unlawful.

§ 146.02 Law authorizing these regulations.

The laws authorizing these regulations and all other UIC program regulations are referenced in 40 CFR part 122. They include Sections 1421, 1422, 1423, 1431, 1445, 1447 and 1450 of the Public Health Service Act as amended by the Safe Drinking Water Act ("SDWA") (Pub. L. 93-523) and by the SDWA Amendments of 1977 (Pub. L. 95-190).

§ 146.03 Definitions.

The following definitions apply to the underground injection control program.

Abandoned well means a well whose use has been permanently discontinued or which is in a state of disrepair such that it cannot be used for its intended purpose or for observation purposes.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in approved States, including any approved modifications or revisions. For RCRA, application also includes the information required by the Director under § 122.25 (contents of Part B of the RCRA application).

Aquifer means a geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

Area of review means the area surrounding an "injection well" described according to the criteria set forth in § 146.06.

Casing means a heavy metal (steel or iron) pipe or tubing of varying diameter and weight, lowered into a borehole during or after drilling in order to support the sides of the hole and thus prevent the walls from caving, to prevent loss of drilling mud into porous ground, or to prevent water, gas, or other fluid from entering the hole.

Catastrophic collapse means the sudden and utter failure of overlying "strata" caused by removal of underlying materials.

Cementing means the operation whereby a cement slurry is pumped into a drilled hole and/or forced behind the casing.

Confining bed means a body of impermeable or distinctly less permeable material stratigraphically adjacent to one or more aquifers.

Confining zone means a geological formation, group of formations, or part of a formation that is capable of limiting fluid movement above an injection zone.

Contaminant means any physical, chemical, biological, or radiological substance or matter in water.

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no approved State program, and there is an EPA administered program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even where there is an approved State program. (For example, when EPA issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval, see § 123.69.) In such cases, the term "Director" means the Regional Administrator and not the State Director.

Disposal well means a well used for the disposal of waste into a subsurface stratum.

Effective date of a UIC program means the date that a State UIC program is approved or established by the Administrator.

Environmental Protection Agency ("EPA") means the United States Environmental Protection Agency.

EPA means the United States "Environmental Protection Agency."

Exempted acquifer means an aquifer or its portion that meets the criteria in the definition of "underground source of drinking water" but which has been exempted according to the procedures of § 122.35(b).

Existing injection well means an "injection well" other than a "new injection well."

Facility or activity means any "HWM facility," UIC "injection well," NPDES "point source," or State 404 dredge and fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

Fault means a surface or zone of rock fracture along which there has been displacement.

Flow rate means the volume per time unit given to the flow of gases or other fluid substance which emerges from an orifice, pump, turbine or passes along a conduit or channel.

Fluid means material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

Formation means a body of rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

Formation fluid means "fluid" present in a "formation" under natural conditions as opposed to introduced fluids, such as drilling mud.

Generator means any person, by site location, whose act or process produces hazardous waste identified or listed in 40 CFR Part 261.

Ground water means water below the land surface in a zone of saturation.

Hazardous waste means a hazardous waste as defined in 40 CFR 261.3.

Hazardous Waste Management facility ("HWM facility") means all contiguous land, and structures, other appurtenances, and improvements on the land used for treating, storing, or disposing of hazardous waste. A facility may consist of several treatment, storage, or disposal operational units (for example, one or more landfills, surface impoundments, or combination of them).

HWM facility means "Hazardous Waste Management facility."

Injection well means a "well" into which "fluids" are being injected.

Injection zone means a geological "formation", group of formations, or part of a formation receiving fluids through a well.

Lithology means the description of rocks on the basis of their physical and chemical characteristics.

Owner or operator means the owner or operator of any facility or activity subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

Packer means a device lowered into a well which can be expanded to produce a water-tight seal.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part and Parts 122, 123 and 124. Permit does not include RCRA interim status (§ 122.23), UIC authorization by rule (§ 122.37), or any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Plugging means the act or process of stopping the flow of water, oil, or gas in "formations" penetrated by a borehole or "well."

Plugging record means a systematic listing of permanent or temporary abandonment of water, oil, gas, test, exploration and waste injection wells, and may contain a well log, description of amounts and types of plugging material used, the method employed for plugging, a description of formations which are sealed and a graphic log of the well showing formation location.

formation thickness, and location of plugging structures.

Pressure means the total load or force per unit area acting on a surface.

Radioactive Waste means any waste which contains radioactive material in concentrations which exceed those listed in 10 CFR Part 20, Appendix B, Table II, Column 2, or exceed the "Criteria for Identifying and Applying Characteristics of Hazardous Waste and for Listing Hazardous Waste" in 40 CFR Part 261, whichever is applicable.

RCRA means the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (Pub. L. 94-580, as amended by Pub. L. 95-609, 42 U.S.C. 6901 et seq.).

SDWA means the Safe Drinking Water Act (Pub. L. 95-523, as amended by Pub. L. 95-190, 42 U.S.C. 300(f) *et seq.*).

Site means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.

Sole or principal source acquifer means an aquifer which has been designated by the Administrator pursuant to sections 1424 (a) or (e) of the SDWA.

State Director means the chief administrative officer of any State or interstate agency operating an approved program, or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

Stratum (plural *strata*) means a single sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock material.

Subsidence means the lowering of the natural land surface in response to: Earth movements; lowering of fluid pressure; removal of underlying supporting material by mining or solution of solids, either artificially or from natural causes; compaction due to wetting (Hydrocompaction); oxidation of organic matter in soils; or added load on the land surface.

Surface casing means the first string of well casing to be installed in the well.

Total dissolved solids ("TDS") means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR Part 136.

UIC means the Underground Injection Control program under Part C of the Safe Drinking Water Act, including an "approved program."

Underground injection means a "well injection."

Underground source of drinking water ("USDW") means an "aquifer" or its portion:

(1)(i) Which supplies drinking water for human consumption; or

(ii) In which the ground water contains fewer than 10,000 mg/1 "total dissolved solids;" and

(2) Which is not an "exempted aquifer."

USDW means "underground source of drinking water."

Well means a bored, drilled or driven shaft, or a dug hole, whose depth is greater than the largest surface dimension.

Well injection means the subsurface emplacement of fluids through a bored, drilled or driven well; or through a dug well, where the depth of the dug well is greater than the largest surface dimension.

Well log means a log obtained from a well, showing such information as resistivity, radioactivity, spontaneous potential, and acoustic velocity as a function of depth.

Well plug means a watertight and gastight seal installed in a borehole or well to prevent movement of fluids.

Well record means a concise statement of the available data regarding a well, such as a scout ticket; a full history or day-by-day account of a well, from the day the well was surveyed to the day production ceased.

Well stimulation means several processes used to clean the well bore, enlarge channels, and increase pore space in the interval to be injected thus making it possible for wastewater to move more readily into the formation, and includes (1) surging, (2) jetting, (3) blasting, (4) acidizing, (5) hydraulic fracturing.

Well monitoring means the measurement, by on-site instruments or laboratory methods, of the quality of water in a well.

§ 146.04 Criteria for exempted aquifers.

An aquifer or a portion thereof which meets the criteria for an "underground source of drinking water" in § 146.03 may be determined under 40 CFR 122.35 to be an "exempted aquifer" if it meets the following criteria:

(a) It does not currently serve as a source of drinking water; and

(b) It cannot now and will not in the future serve as a source of drinking water because:

(1) It is mineral, hydrocarbon or geothermal energy producing;

(2) It is situated at a depth or location which makes recovery of water for drinking water purposes economically or technologically impractical;

(3) It is so contaminated that it would be economically or technologically impractical to render that water fit for human consumption; or

(4) It is located over a Class III well mining area subject to subsidence or catastrophic collapse.

§ 146.05 Classification of injection wells.

Injection wells are classified as follows:

(a) *Class I.* (1) Wells used by generators of hazardous wastes or owners or operators of hazardous waste management facilities to inject hazardous waste, other than Class IV wells.

(2) Other industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water.

(b) *Class II.* Wells which inject fluids:

(1) Which are brought to the surface in connection with conventional oil or natural gas production;

(2) For enhanced recovery of oil or natural gas; and

(3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

(c) *Class III.* Wells which inject for extraction of minerals or energy, including:

(1) Mining of sulfur by the Frasch process;

(2) Solution mining of minerals;

Note.—Solution mining of minerals includes sodium chloride, potash, phosphate, copper, uranium and any other mineral which can be mined by this process.

(3) in-situ combustion of fossil fuel: and

Note.—Fossil fuels includes coal, tar sands, oil shale and any other fossil fuel which can be mined by this process.

(4) recovery of geothermal energy to produce electric power.

Note.—Class III wells include the recovery of geothermal energy to produce electric power but do not include wells used in heating or aquaculture which fall under Class V.

(d) *Class IV.* Wells used by generators of hazardous wastes or of radioactive wastes, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous wastes or radioactive wastes into or above a formation which within one quarter mile of the well contains an underground source of drinking water.

(e) *Class V.* Injection wells not included in Class I, II, III, or IV.

Note.—Class V wells includes:

(1) Air conditioning return flow wells used to return to the supply aquifer the water used for heating or cooling in a heat pump;

(2) Cesspools or other devices that receive wastes, which have an open bottom and sometimes have perforated sides. The UIC requirements do not apply to single family residential cesspools;

(3) Cooling water return flow wells used to inject water previously used for cooling;

(4) Drainage wells used to drain surface fluid, primarily storm runoff, into a subsurface formation;

(5) Dry wells used for the injection of wastes into a subsurface formation;

(6) Recharge wells used to replenish the water in an aquifer;

(7) Salt water intrusion barrier wells used to inject water into a fresh water aquifer to prevent the intrusion of salt water into the fresh water;

(8) Sand backfill wells used to inject a mixture of water and sand, mill tailings or other solids into mined out portions of subsurface mines;

(9) Septic system wells used:

(i) To inject the waste or effluent from a multiple dwelling, business establishment, community or regional business establishment septic tank; or

(ii) For a multiple dwelling, community or regional cesspool. The UIC requirements do not apply to single family residential waste disposal systems;

(10) Subsidence control wells (not used for the purpose of oil or natural gas production) used to inject fluids into a non-oil or gas producing zone to reduce or eliminate subsidence associated with the overdraft of fresh water;

(11) Wells used for the storage of hydrocarbons which are gases at standard temperature and pressure;

(12) Geothermal wells used in heating and aquaculture;

(13) Nuclear disposal wells.

§ 146.06 Area of Review.

The area of review for each injection well or each field, project or area of the State shall be determined according to either paragraph (a) or (b) of this section. The Director may solicit input from the owners or operators of injection wells within the State as to which method is most appropriate for each geographic area or field.

(a) *Zone of endangering influence.* The zone of endangering influence shall be that area the radius of which is the lateral distance from an injection well, field or project in which the pressures in the injection zone may cause the migration of the injection and/or formation fluid into an underground source of drinking water. Computation of the zone of endangering influence may be based upon the parameters listed below and should be calculated for an injection time period equal to the expected life of the injection well or pattern. The following modified Theis equation illustrates one form which the mathematical model may take.

BILLING CODE 6560-01-M

$$r = \left(\frac{2.25\ K\ H\ t}{S\ 10^{X}} \right)^{1/2}$$

where:

$$X = \frac{4 \pi\ KH \left(h_w - h_{b_o}\ X\ SpG_b \right)}{2.3\ Q}$$

r = Radius of endangering influence from injection well (length)

K = Hydraulic conductivity of the injection zone (length/time)

H = Thickness of the injection zone (length)

t = Time of injection (time)

S = Storage coefficient (dimensionless)

Q = Injection rate (volume/time)

h_{b_o} = Observed original hydrostatic head of injection zone (length) measured from the base of the lowest underground source of drinking water

h_w = Hydrostatic head of underground source of drinking water (length) measured from the base of the lowest underground source of drinking water

SpG_b = Specific gravity of fluid in the injection zone (dimensionless)

π = 3.142 (dimensionless).

BILLING CODE 6560-01-C

The above equation is based on the following assumptions:

(1) The injection zone is homogenous and isotropic;

(2) The injection zone has infinite areal extent;

(3) The injection well penetrates the entire thickness of the injection zone;

(4) The well diameter is infinitesimal compared to "r" when injection time is longer than a few minutes; and

(5) The emplacement of fluid into the injection zone creates instantaneous increase in pressure.

Other models may be used as appropriate for different situations encountered in the field or where the model assumptions match more closely those situations.

(b) *Fixed Radius.* A fixed radius around the well, field or project of not less than one-fourth (¼) mile may be used. In determining the fixed radius, the following factors shall be taken into consideration: Chemistry of injected and formation fluids; hydrogeology; population and ground-water use and dependence; and historical practices in the area.

(c) If the area of review is determined by a mathematical model pursuant to paragraph (a) of this section, the permissible radius is the result of such calculation even if it is less than one-fourth (¼) mile.

§ 146.07 Corrective Action.

In determining the adequacy of corrective action proposed by the applicant under 40 CFR 122.44 and in determining the additional steps needed to prevent fluid movement into underground sources of drinking water, the following criteria and factors shall be considered by the Director:

(a) Toxicity and volume of the injected fluid;

(b) Toxicity of native fluids or by-products of injection;

(c) Potentially affected population;

(d) Geology;

(e) Hydrology;

(f) History of the injection operation;

(g) Completion and plugging records;

(h) Abandonment procedures in effect at the time the well was abandoned; and

(i) Hydraulic connections with underground sources of drinking water.

§ 146.08 Mechanical Integrity.

(a) An injection well has mechanical integrity if:

(1) There is no significant leak in the casing, tubing or packer; and

(2) There is no significant fluid movement into an underground source of drinking water through vertical channels adjacent to the injection well bore.

(b) One of the following tests must be used to evaluate the absence of significant leaks under paragraph (a)(1) of this section.

(1) Monitoring of annulus pressure; or

(2) Pressure test with liquid or gas.

(c) One of the following methods must be used to determine the absence of significant fluid movement under paragraph (a)(2) of this section:

(1) For Class II only, well records demonstrating the presence of adequate cement to prevent such migration; or

(2) The results of a temperature or noise log.

(d) The Director may allow the use of a test to demonstrate mechanical integrity other than those listed in paragraphs (b) and (c)(2) of this section with the written approval of the Administrator. To obtain approval, the Director shall submit a written request to the Administrator, which shall set forth the proposed test and all technical data supporting its use. The Administrator shall approve the request if it will reliably demonstrate the mechanical integrity of wells for which its use is proposed. Any alternate method approved by the Administrator shall be published in the **Federal Register** and may be used in all States unless its use is restricted at the time of approval by the Administrator.

(e) In conducting and evaluating the tests enumerated in this section or others to be allowed by the Director, the owner or operator and the Director shall apply methods and standards generally accepted in the industry. When the owner or operator reports the results of mechanical integrity tests to the Director, he shall include a description of the test(s) and the method(s) used. In making his/her evaluation, the Director shall review monitoring and other test data submitted since the previous evaluation.

§ 146.09 Criteria for Establishing Permitting Priorities.

In determining priorities for setting times for owners or operators to submit applications for authorization to inject under the procedures of § 122.38 or § 123.4(g), the Director shall base these priorities upon consideration of the following factors:

(a) Injection wells known or suspected to be contaminating underground sources of drinking water;

(b) Injection wells known to be injecting fluids containing hazardous contaminants;

(c) Likelihood of contamination of underground sources of drinking water;

(d) Potentially affected population;

(e) Injection wells violating existing State requirements;

(f) Coordination with the issuance of permits required by other State or Federal permit programs;

(g) Age and depth of the injection well; and

(h) Expiration dates of existing State permits, if any.

§ 146.10 Plugging and Abandoning Class I–III Wells.

(a) Prior to abandoning Class I–III wells the well shall be plugged with cement in a manner which will not allow the movement of fluids either into or between underground sources of drinking water.

(b) Placement of the cement plugs shall be accomplished by one of the following:

(1) The Balance Method;

(2) The Dump Bailer Method; or

(3) The Two-Plug Method.

(c) The well to be abandoned shall be in a state of static equilibrium with the mud weight equalized top to bottom, either by circulating the mud in the well at least once or by a comparable method prescribed by the Director, prior to the placement of the cement plug(s).

(d) The plugging and abandonment plan required in 40 CFR 122.42(f) and 122.41(e) shall, in the case of a Class III well field which underlies or is in an aquifer which has been exempted under 40 CFR 146.04, also demonstrate that no movement of contaminants from the mined zone into an underground source of drinking water will occur. The Director shall prescribe aquifer cleanup and monitoring where he deems it necessary and feasible to insure that no migration of contaminants from the mined zone into an underground source of drinking water will occur.

Subpart B—Criteria and Standards Applicable to Class I Wells

§ 146.11 Applicability.

This subpart establishes criteria and standards for underground injection control programs to regulate Class I wells.

§ 146.12 Construction Requirements.

(a) All Class I wells shall be sited in such a fashion that they inject into a formation which is beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water.

(b) All Class I wells shall be cased and cemented to prevent the movement of fluids into or between underground sources of drinking water. The casing and cement used in the construction of each newly drilled well shall be designed for the life expectancy of the well. In determining and specifying casing and cementing requirements, the following factors shall be considered:

(1) Depth to the injection zone;

(2) Injection pressure, external pressure, internal pressure, and axial loading;

(3) Hole size;

(4) Size and grade of all casing strings (wall thickness, diameter, nominal weight, length, joint specification, and construction material);

(5) Corrosiveness of injected fluid, formation fluids, and temperatures;

(6) Lithology of injection and confining intervals; and

(7) Type or grade of cement.

(c) All Class I injection wells, except those municipal wells injecting non-corrosive wastes, shall inject fluids through tubing with a packer set immediately above the injection zone, or tubing with an approved fluid seal as an alternative. The tubing, packer, and fluid seal shall be designed for the expected service.

(1) The use of other alternatives to a packer may be allowed with the written approval of the Director. To obtain approval, the operator shall submit a written request to the Director, which shall set forth the proposed alternative and all technical data supporting its use. The Director shall approve the request if the alternative method will reliably provide a comparable level of protection to underground sources of drinking water. The Director may approve an alternative method solely for an individual well or for general use.

(2) In determining and specifying requirements for tubing, packer, or alternatives the following factors shall be considered:

(i) Depth of setting;

(ii) Characteristics of injection fluid (chemical content, corrosiveness, and density);

(iii) Injection pressure;

(iv) Annular pressure;

(v) Rate, temperature and volume of injected fluid; and

(vi) Size of casing.

(d) Appropriate logs and other tests shall be conducted during the drilling and construction of new Class I wells. A descriptive report interpreting the results of such logs and tests shall be prepared by a qualified log analyst and submitted to the Director. At a minimum, such logs and tests shall include:

(1) Deviation checks on all holes constructed by first drilling a pilot hole, and then enlarging the pilot hole by reaming or another method. Such checks shall be at sufficiently frequent intervals to assure that vertical avenues for fluid migration in the form of diverging holes are not created during drilling.

(2) Such other logs and tests as may be needed after taking into account the availability of similar data in the area of the drilling site, the construction plan, and the need for additional information, that may arise from time to time as the construction of the well progresses. In determining which logs and tests shall be required, the following logs shall be considered for use in the following situations:

(i) For surface casing intended to protect underground sources of drinking water:

(A) Resistivity, spontaneous potential, and caliper logs before the casing is installed; and

(B) A cement bond, temperature, or density log after the casing is set and cemented.

(ii) For intermediate and long strings of casing intended to facilitate injection:

(A) Resistivity, spontaneous potential, porosity, and gamma ray logs before the casing is installed;

(B) Fracture finder logs; and

(C) A cement bond, temperature, or density log after the casing is set and cemented.

(e) At a minimum, the following information concerning the injection formation shall be determined or calculated for new Class I wells:

(1) Fluid pressure;

(2) Temperature;

(3) Fracture pressure;

(4) Other physical and chemical characteristics of the injection matrix; and

(5) Physical and chemical characteristics of the formation fluids.

§ 146.13 Operating, Monitoring and Reporting Requirements.

(a) *Operating Requirements.* Operating requirements shall, at a minimum, specify that:

(1) Injection pressure at the wellhead shall not exceed a maximum which shall be calculated so as to assure that the pressure in the injection zone during injection does not initiate new fractures or propagate existing fractures in the injection zone, initiate fractures in the confining zone or cause the movement of injection or formation fluids into an underground source of drinking water.

(2) Injection between the outermost casing protecting underground sources of drinking water and the well bore is prohibited.

(3) Unless an alternative to a packer has been approved under § 146.12(c), the annulus between the tubing and the long string of casings shall be filled with a fluid approved by the Director and a pressure, also approved by the Director, shall be maintained on the annulus.

(b) *Monitoring Requirements.* Monitoring requirements shall, at a minimum, include:

(1) The analysis of the injected fluids with sufficient frequency to yield representative data of their characteristics;

(2) Installation and use of continuous recording devices to monitor injection pressure, flow rate and volume, and the pressure on the annulus between the tubing and the long string of casing;

(3) A demonstration of mechanical integrity pursuant to § 146.08 at least once every five years during the life of the well; and

(4) The type, number and location of wells within the area of review to be used to monitor any migration of fluids into and pressure in the underground sources of drinking water, the parameters to be measured and the frequency of monitoring.

(c) *Reporting Requirements.* Reporting requirements shall, at a minimum, include:

(1) Quarterly reports to the Director on:

(i) The physical, chemical and other relevant characteristics of injection fluids;

(ii) Monthly average, maximum and minimum values for injection pressure, flow rate and volume, and annular pressure; and

(iii) The results of monitoring prescribed under subparagraph (b)(4) of this section.

(2) Reporting the results, with the first quarterly report after the completion, of:

(i) Periodic tests of mechanical integrity;

(ii) Any other test of the injection well conducted by the permittee if required by the Director; and

(iii) Any well work over.

§ 146.14 Information to be Considered by the Director.

This section sets forth the information which must be considered by the Director in authorizing Class I wells. For an existing or converted new Class I well the Director may rely on the existing permit file for those items of information listed below which are current and accurate in the file. For a newly drilled Class I well, the Director shall require the submission of all the information listed below. For both existing and new Class I wells certain maps, cross-sections, tabulations of wells within the area of review and other data may be included in the application by reference provided they are current, readily available to the Director (for example, in the permitting agency's files) and sufficiently identified to be retrieved. In cases where EPA issues the permit all the information in this Section must be submitted to the Administrator.

(a) Prior to the issuance of a permit for an existing Class I well to operate or the construction or conversion of a new Class I well the Director shall consider the following:

(1) Information required in 40 CFR 122.4 and 122.38(c);

(2) A map showing the injection well(s) for which a permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all producing wells, injection wells, abandoned wells, dry holes, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells and other pertinent surface features including residences and roads. The map should also show faults, if known or suspected. Only information of public record is required to be included on this map;

(3) A tabulation of data on all wells within the area of review which penetrate into the proposed injection zone. Such data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the Director may require;

(4) Maps and cross sections indicating the general vertical and lateral limits of all underground sources of drinking water within the area of review, their position relative to the injection formation and the direction of water movement, where known, in each underground source of drinking water which may be affected by the proposed injection;

(5) Maps and cross sections detailing the geologic structure of the local area;

(6) Generalized maps and cross sections illustrating the regional geologic setting;

(7) Proposed operating data:

(i) Average and maximum daily rate and volume of the fluid to be injected;

(ii) Average and maximum injection pressure; and

(iii) Source and an analysis of the chemical, physical, radiological and biological characteristics of injection fluids;

(8) Proposed formation testing program to obtain an analysis of the chemical, physical and radiological characteristics of and other information on the receiving formation;

(9) Proposed stimulation program;

(10) Proposed injection procedure;

(11) Engineering drawings of the surface and subsurface construction details of the system;

(12) Contingency plans to cope with all shut-ins or well failures so as to prevent migration of fluids into any underground source of drinking water;

(13) Plans (including maps) for meeting the monitoring requirements in § 146.13(b);

(14) For wells within the area of review which penetrate the injection zone but are not properly completed or plugged, the corrective action proposed to be taken under 40 CFR 122.44;

(15) Construction procedures including a cementing and casing program, logging procedures, deviation checks, and a drilling, testing, and coring program; and

(16) A certificate that the applicant has assured, through a performance bond or other appropriate means, the resources necessary to close, plug or abandon the well as required by 40 CFR 122.42(a).

(b) Prior to granting approval for the operation of a Class I well the Director shall consider the following information:

(1) All available logging and testing program data on the well;

(2) A demonstration of mechanical integrity pursuant to § 146.08;

(3) The actual operating data;

(4) The results of the formation testing program;

(5) The actual injection procedure;

(6) The compatibility of injected waste with fluids in the injection zone and minerals in both the injection zone and the confining zone; and

(7) The status of corrective action on defective wells in the area of review.

(c) Prior to granting approval for the plugging and abandonment of a Class I well the Director shall consider the following information:

(1) The type and number of plugs to be used;

(2) The placement of each plug including the elevation of the top and bottom;

(3) The type and grade and quantity of cement to be used;

(4) The method for placement of the plugs; and

(5) The procedure to be used to meet the requirements of § 146.10(c).

§ 146.15 Mid-course evaluation requirements.

In compliance with 40 CFR 122.18(c)(4)(c)(ii) the data to be submitted on each Class I permit at six month intervals during the first two years of operation of the State program shall at a minimum include the following:

(a) The data required in § 146.14(a)(1);

(b) The data required in § 146.14(a)(3) including, under location, the distance and direction from the injection well;

(c) The depth to the top and bottom of any USDW;

(d) The distance to the nearest down-gradient water supply well;

(e) A description of the geology and hydrology of the area;

(f) The construction characteristics of the well;

(g) The corrective action proposed as well as that performed;

(h) The type and results of all mechanical integrity tests reported to the Director; and

(i) Any reporting to the Director under § 122.41(d).

Subpart C—Criteria and Standards Applicable to Class II Wells

§ 146.21 Applicability.

This subpart establishes criteria and standards for underground injection control programs to regulate Class II wells.

§ 146.22 Construction requirements.

(a) All new Class II wells shall be sited in such a fashion that they inject into a formation which has confining zones that are free of known open faults or fractures within the area of review.

(b) All Class II injection wells shall be cased and cemented to prevent movement of fluids into or between underground sources of drinking water. The casing and cement used in the construction of each newly drilled well shall be designed for the life expectancy of the well. In determining and specifying casing and cementing requirements, the following factors shall be considered:

(1) Depth to the injection zone;

(2) Injection pressure, external pressure, internal pressure, and axial loading;

(3) Hole size;

(4) Size and grade of all casing strings (wall thickness, diameter, nominal weight, length, joint specification, and construction material);

(5) Corrosiveness of injected fluid and formation fluids;

(6) Lithology of injection and confining zones; and

(7) Type and grade of cement.

(c) The requirements in paragraph (b) of this section need not apply to existing or newly converted Class II wells located in existing fields if:

(1) Regulatory controls for casing and cementing existed for those wells at the time of drilling and those wells are in compliance with those controls; and

(2) Well injection will not result in the movement of fluids into an underground

source of drinking water so as to create a significant risk to the health of persons.

(d) The requirements in paragraph (b) of this section need not apply to newly drilled wells in existing fields if:

(1) They meet the requirements of the State for casing and cementing applicable to that field at the time of submission of the State program to the Administrator; and

(2) Well injection will not result in the movement of fluids into an underground source of drinking water so as to create a significant risk to the health of persons.

(e) Where a State did not have regulatory controls for casing and cementing prior to the time of the submission of the State program to the Administrator, the Director need not apply the casing and cementing requirements in paragraph (b) of this section if he submits as a part of his application for primacy, an appropriate plan for casing and cementing of existing, newly converted, and newly drilled wells in existing fields, and the Administrator approves the plan.

(f) Appropriate logs and other tests shall be conducted during the drilling and construction of new Class II wells. A descriptive report interpreting the results of these logs and tests shall be prepared by a qualified log analyst and submitted to the Director. At a minimum, these logs and tests shall include:

(1) Deviation checks on all holes constructed by first drilling a pilot hole and then enlarging the pilot hole, by reaming or another method. Such checks shall be at sufficiently frequent intervals to assure that vertical avenues for fluid movement in the form of diverging holes are not created during drilling.

(2) Such other logs and tests as may be needed after taking into account the availability of similar data in the area of the drilling site, the construction plan, and the need for additional information that may arise from time to time as the construction of the well progresses. In determining which logs and tests shall be required the following shall be considered by the Director in setting logging and testing requirements:

(i) For surface casing intended to protect underground sources of drinking water:

(A) Resistivity, spontaneous potential, and caliper logs before the casing is installed; and

(B) A cement bond, temperature, or density log after the casing is set and cemented.

(ii) For intermediate and long strings of casing intended to facilitate injection:

(A) Resistivity, spontaneous potential, porosity, and gamma ray logs before the casing is installed;

(B) Fracture finder logs; and

(C) A cement bond, temperature, or density log after the casing is set and cemented.

(g) At a minimum, the following information concerning the injection formation shall be determined or calculated for new Class II wells:

(1) Fluid pressure;

(2) Temperature;

(3) Fracture pressure;

(4) Other physical and chemical characteristics of the injection zone; and

(5) Physical and chemical characteristics of the formation fluids.

§ 146.23 Operating, monitoring, and reporting requirements.

(a) *Operating Requirements.* Operating requirements shall, at a minimum, specify that:

(1) Except during well stimulation for enhanced recovery wells, injection pressure at the wellhead shall not exceed a maximum which shall be calculated so as to assure that the pressure in the injection zone during injection does not initiate new fractures or propagate existing fractures in the injection zone. In no case, shall injection pressure initiate fractures in the confining zone or cause the movement of injection or formation fluids into an underground source of drinking water.

(2) Injection between the outermost casing protecting underground sources of drinking water and the well bore shall be prohibited.

(b) *Monitoring Requirements.* Monitoring requirements shall, at a minimum, include:

(1) Monitoring of the nature of injected fluids at time intervals sufficiently frequent to yield data representative of their characteristics;

(2) Monitoring of injection pressure, flow rate, and cumulative volume at least with the following frequencies:

(i) Weekly for produced fluid disposal operations;

(ii) Monthly for enhanced recovery operations;

(iii) Daily during the injection of liquid hydrocarbons and injection for withdrawal of stored hydrocarbons; and

(iv) Daily during the injection phase of cyclic steam operations;

(3) A demonstration of mechanical integrity pursuant to § 146.08 at least once every five years during the life of the injection well;

(4) Maintenance of the results of all monitoring until the next permit review (see 40 CFR 122.42(e)); and

(5) Hydrocarbon storage and enhanced recovery may be monitored on a field or project basis rather than on an individual well basis by manifold monitoring. Manifold monitoring may be used in cases of facilities consisting of more than one injection well, operating with a common manifold. Separate monitoring systems for each well are not required provided the owner/operator demonstrates that manifold monitoring is comparable to individual well monitoring.

(c) *Reporting Requirements.* (1) Reporting requirements shall, at a minimum include an annual report to the Director summarizing the results of the monitoring required under paragraph (b) of this section. Previously submitted information may be included by reference.

(2) Owners or operators of hydrocarbon storage and enhanced recovery projects may report on a field or project basis rather than an individual well basis where manifold monitoring is used.

§ 146.24 Information to be considered by the director.

This section sets forth the information which must be considered by the Director in authorizing Class II wells. Certain maps, cross-sections, tabulations of wells within the area of review, and other data may be included in the application by reference provided they are current, readily available to the Director (for example, in the permitting agency's files) and sufficiently identified to be retrieved. In cases where EPA issues the permit, all the information in this Section is to be submitted to the Administrator.

(a) Prior to the issuance of a permit for an existing Class II well to operate or the construction or conversion of a new Class II well the Director shall consider the following:

(1) Information required in 40 CFR 122.4 and 122.38(c);

(2) A map showing the injection well(s) for which a permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all producing wells, injection wells, abandoned wells, dry holes and water wells. The map should also show faults, if known or suspected. Only wells of public record are required to be included on this map. This requirement does not apply to existing Class II wells; and

(3) A tabulation of data on all wells within the area of review which penetrate the proposed injection zone. Such data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any

additional information the Director may require. This requirement does not apply to existing Class II wells.

(4) Proposed operating data:

(i) Average and maximum daily rate and volume of fluids to be injected;

(ii) Average and maximum injection pressure; and

(iii) Source, and an analysis of the chemical, physical, radiological and biological characteristics of the injection fluid;

(5) Appropriate geological data on the injection zone and confining zones including lithologic description, geological name, thickness, depth and lateral extent;

(6) Geologic name, lateral extent and depth to top and bottom of all underground sources of drinking water which may be affected by the injection;

(7) Engineering drawings of the surface and subsurface construction details of the system;

(8) Proposed formation testing program;

(9) Proposed stimulation program;

(10) Proposed injection procedure;

(11) Contingency plans to cope with all shut-ins or well failures so as to prevent migration of contaminating fluids into any underground source of drinking water;

(12) Plans for meeting the monitoring requirements of § 146.23(b);

(13) In the case of new injection wells, the corrective action proposed to be taken by the applicant under 40 CFR 122.44;

(14) A certificate that the applicant has assured, through a performance bond or other appropriate means, the resources necessary to close, plug or abandon the well as required by 40 CFR 122.42(g).

(b) Prior to granting approval for the operation of a Class II well the Director shall consider the following information:

(1) All available logging and testing program data on the well;

(2) A demonstration of mechanical integrity pursuant to § 146.08;

(3) The actual operating data;

(4) The results of the formation testing program;

(5) The actual injection procedure; and

(6) For new wells the status of corrective action on defective wells in the area of review.

(c) Prior to granting approval for the plugging and abandonment of a Class II well the Director shall consider the following information:

(1) The type, and number of plugs to be used;

(2) The placement of each plug including the elevation of top and bottom;

(3) The type, grade, and quantity of cement to be used;

(4) The method of placement of the plugs; and

(5) The procedure to be used to meet the requirements of § 146.10(c).

§ 146.25 Mid-course evaluation requirements.

(a) In compliance with 40 CFR 122.18(c)(4)(C)(ii) the data to be submitted on each new Class II permit at six months intervals during the first two years of operation of the State program shall at a minimum include the following:

(1) The data required in § 146.24(a)(1);

(2) The data required in § 146.24(a)(3) including, under location, the distance and direction from the injection well;

(3) The depth to the top and bottom of any USDW;

(4) The distance to the nearest down-gradient water supply well;

(5) A description of the geology and hydrology of the area;

(6) The construction characteristics of the well;

(7) The corrective action proposed as well as that performed; and

(8) Any reporting to the Director under § 122.41(d).

(b) The Director shall also submit the type and results of all Mechanical Integrity tests reported on existing wells and new (conversion only) wells during the first two years of operation.

(c) The Director shall require a temperature log or noise log, on a sample of Class II wells in cases where operators submitted cementing records to meet the requirement of § 146.08(c). The wells to be tested shall be chosen by a formal random selection procedure. The sampling shall be done on a field or pool basis and be statistically representative of the wells in that field or pool. At a minimum, the sample size for each State shall be 100 wells or 5 percent of the number of Class II injection wells in the State whichever is smaller. At least half of the wells tested must be existing wells.

Subpart D—Criteria and Standards Applicable to Class III Wells

§ 146.31 Applicability.

This subpart establishes criteria and standards for underground injection control programs to regulate Class III wells.

§ 146.32 Construction requirements.

(a) All new Class III wells shall be cased and cemented to prevent the migration of fluids into or between underground sources of drinking water. The casing and cement used in the construction of each newly drilled well shall be designed for the life expectancy of the well. In determining and specifying casing and cementing requirements, the following factors shall be considered:

(1) Depth to the injection zone;

(2) Injection pressure, external pressure, internal pressure, axial loading, etc.;

(3) Hole size;

(4) Size and grade of all casing strings (wall thickness, diameter, nominal weight, length, joint specification, and construction material);

(5) Corrosiveness of injected fluids and formation fluids;

(6) Lithology of injection and confining zones; and

(7) Type and grade of cement.

(b) Appropriate logs and other tests shall be conducted during the drilling and construction of new Class III wells. A descriptive report interpreting the results of such logs and tests shall be prepared by a qualified log analyst and submitted to the Director. The logs and tests appropriate to each type of Class III well shall be determined based on the intended function, depth, construction and other characteristics of the well, availability of similar data in the area of the drilling site and the need for additional information that may arise from time to time as the construction of the well progresses. At a minimum, such logs and tests shall include deviation checks conducted on all holes where pilot holes and reaming are used, at sufficiently frequent intervals to assure that vertical avenues for fluid migration in the form of diverging holes are not created during drilling.

(c) Where the injection zone is a water bearing formation, the following information concerning the injection zone shall be determined or calculated for new Class III wells:

(1) Fluid pressure;

(2) Temperature;

(3) Fracture pressure;

(4) Other physical and chemical characteristics of the injection zone;

(5) Physical and chemical characteristics of the formation fluids; and

(6) Compatibility of injected fluids with formation fluids.

(d) Where the injection formation is not a water bearing formation, the information in paragraph (c)(3) of this section must be submitted.

(e) Where injection is into a formation which contains water with less than 10,000 mg/l TDS monitoring wells shall be completed into the injection zone and into any underground sources of drinking water above the injection zone which could be affected by the mining operation. These wells shall be located in such a fashion as to detect any excursion of injection fluids, process by-products, or formation fluids outside the mining area or zone. If the operation may be affected by subsidence or catastrophic collapse the monitoring wells shall be located so that they will not be physically affected.

(f) Where injection is into a formation which does not contain water with less than 10,000 mg/l TDS, no monitoring wells are necessary in the injection stratum.

(g) Where the injection wells penetrate an USDW in an area subject to subsidence or catastrophic collapse an adequate number of monitoring wells shall be completed into the USDW to detect any movement of injected fluids, process by-products or formation fluids into the USDW. The monitoring wells shall be located outside the physical influence of the subsidence or catastrophic collapse.

(h) In determining the number, location, construction and frequency of monitoring of the monitoring wells the following criteria shall be considered:

(1) The population relying on the USDW affected or potentially affected by the injection operation;

(2) The proximity of the injection operation to points of withdrawal of drinking water;

(3) The local geology and hydrology;

(4) The operating pressures and whether a negative pressure gradient is being maintained;

(5) The toxicity and volume of the injected fluid, the formation water, and the process by-products; and

(6) The injection well density.

§ 146.33 Operating, monitoring, and reporting requirements.

(a) *Operating Requirements.* Operating requirements prescribed shall, at a minimum, specify that:

(1) Injection pressure at the wellhead shall not exceed a maximum which shall be calculated so as to assure that the pressure in the injection zone during injection does not initiate new fractures or propagate existing fractures in the injection zone, initiate fractures in the confining zone or cause the migration of injection or formation fluids into an underground source of drinking water; and

(2) Injection between the outermost casing protecting underground sources of drinking water and the well bore is prohibited.

(b) *Monitoring Requirements.* Monitoring requirements shall, at a minimum, specify:

(1) The analyses of the physical and chemical characteristics of the injected fluid with sufficient frequency to yield representative data on its characteristics;

(2) Installation and use of continuous recording devices to monitor the injection pressure, flow rate and volume;

(3) Demonstration of mechanical integrity pursuant to § 146.08 at least once every five years during the life of the well for salt solution mining and geothermal wells only;

(4) Weekly monitoring of fluid level and the parameters chosen to measure water quality in the injection zone; and

(5) Quarterly monitoring of wells adjacent to the injection site to detect any migration from the injection zone into an USDW.

(6) All Class III wells may be monitored on a field or project basis rather than an individual well basis by manifold monitoring. Manifold monitoring may be used in cases of facilities consisting of more than one injection well, operating with a common manifold. Separate monitoring systems for each well are not required provided the owner/operator demonstrates that manifold monitoring is comparable to individual well monitoring.

(c) *Reporting Requirements.* Reporting requirements shall, at a minimum, include:

(1) Quarterly reporting to the Director on required monitoring;

(2) Results of mechanical integrity and any other periodic test required by the Director reported with the first regular quarterly report after the completion of the test; and

(3) Monitoring may be reported on a project or field basis rather than individual well basis where manifold monitoring is used.

§ 146.34 Information to be considered by the Director.

This section sets forth the information which must be considered by the Director in authorizing Class III wells. Certain maps, cross sections, tabulations of wells within the area of review, and other data may be included in the application by reference provided they are current, readily available to the Director (for example, in the permitting agency's files) and sufficiently identified to be retrieved. In cases where EPA issues the permit, all the information in this section must be submitted to the Administrator.

(a) Prior to the issuance of a permit for an existing Class III well or area to operate or the construction of a new Class III well the Director shall consider the following:

(1) Information required in 40 CFR 122.4 and 122.38(c);

(2) A map showing the injection well(s) for which the permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all producing wells, injection wells, abandoned wells, dry holes, surface bodies of water, mines (surface and subsurface), quarries, public water systems, water wells and other pertinent surface features including residences and roads. The map should also show faults if known or suspected. Only information of public record is required to be included on this map;

(3) A tabulation of data on all wells within the area of review which penetrate the proposed injection zone. Such data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and completion, and any additional information the Director may require;

(4) Maps and cross sections indicating the vertical and lateral limits of all underground sources of drinking water within the area of review, their position relative to the injection formation, and the direction of water movement, where known, in every underground source of drinking water which may be affected by the proposed injection;

(5) Maps and cross sections detailing the geologic structure of the local area;

(6) Generalized map and cross sections illustrating the regional geologic setting;

(7) Proposed operating data:

(i) Average and maximum daily rate and volume of fluid to be injected;

(ii) Average and maximum injection pressure; and

(iii) Source and an analysis of the chemical, physical, biological and radiological characteristics of the injection fluid.

(8) Proposed formation testing program to obtain an analysis of the physical, chemical and radiological characteristics of the receiving formation;

(9) Proposed stimulation program;

(10) Proposed injection procedure;

(11) Engineering drawings of the surface and subsurface construction details of the system;

(12) Plans (including maps) for meeting the monitoring requirements of § 146.33(b);

(13) Expected changes in pressure, native fluid displacement, direction of movement of injection fluid;

(14) Contingency plans to cope with all shut-ins or well failures so as to prevent the migration of contaminating fluids into underground sources of drinking water;

(15) A certificate that the applicant has assured, through a performance bond or other appropriate means, the resources necessary to close, plug or abandon the well as required by 40 CFR 122.42(9); and

(16) The corrective action proposed to be taken under 40 CFR 122.44.

(b) Prior to granting approval for the operation of a Class III well the Director shall consider the following information:

(1) All available logging and testing data on the well;

(2) A satisfactory demonstration of mechanical integrity for all new wells and for all existing salt solution and geothermal wells pursuant to § 146.08.

(3) The actual operating data;

(4) The results of the formation testing program;

(5) The actual injection procedures; and

(6) The status of corrective action on defective wells in the area of review.

(c) Prior to granting approval for the plugging and abandonment of a Class III well the Director shall consider the following information:

(1) The type and number of plugs to be used;

(2) The placement of each plug including the elevation of the top and bottom;

(3) The type, grade and quantity of cement to be used;

(4) The method of placement of the plugs, and

(5) The procedure to be used to meet the requirements of § 146.10(c).

§ 146.35 Mid-course evaluation requirements.

In compliance with 40 CFR 122.18(c)(4)(C)(ii) the data to be submitted on each Class III permit at six month intervals during the first two years of operation of the State program shall at a minimum include the following:

(a) The data required in § 146.14(a)(i);

(b) The data required in § 146.34(a)(3) including, under location, the distance and direction from the injection well;

(c) The depth to the top and bottom of any USDW;

(d) The distance to the nearest down-gradient water supply well;

(e) A description of the geology and hydrology of the area;

(f) The construction characteristics of the well;

(g) The type and results of all mechanical integrity tests reported to the Director during the first two years of the program; and

(h) Any reporting to the Director under § 122.41(d).

Subpart E—Criteria and Standards Applicable to Class IV Injection Wells [Reserved]

Subpart F—Criteria and Standards Applicable to Class V Injection Wells

§ 146.51 Applicability.

This subpart sets forth Criteria and Standards for underground injection control programs to regulate all injection not regulated in Subparts B, C, D, and E.

(a) Generally, wells covered by this Subpart inject non-hazardous fluids into or above formations that contain underground sources of drinking water. It includes all wells listed in § 146.05(e) but is not limited to those types of injection wells.

(b) It also includes wells not covered in Class IV that inject radioactive materials listed in 10 CFR Part 20, Appendix B, Table II, Column 2, and injection wells used to store hydrocarbons which are gases at standard temperature and pressure.

§ 146.52 Inventory and Assessment.

(a) The owner or operator of any Class V well shall, within one year of the effective date of an underground injection control program, notify the Director of the existence of any well meeting the definitions of Class V under his control, and submit the inventory information required in 40 CFR 122.37(c)(1).

(b) Within three (3) years of approval of the State program the Director shall complete and submit to EPA a report containing:

(1) The information on the construction features of Class V wells, and the nature and volume of the injected fluids;

(2) An assessment of the contamination potential of the Class V wells using hydrogeological data available to the State;

(3) An assessment of the available corrective alternatives where appropriate and their environmental and economic consequences; and

(4) Recommendations both for the most appropriate regulatory approaches and for remedial actions where appropriate.

PART 122—MARINE SANITATION DEVICE STANDARD

2. 40 CFR is amended by revising Part 122 as follows:

§ 122.18 [Amended]

a. Section 122.18 is amended by deleting paragraph (c)(4)(ii) and substituting in lieu thereof the following:

* * * * *

(c) * * *

(4) * * *

(ii) In addition to complying with the requirements of paragraph (c)(4)(i) of this section, the Director shall provide the Administrator, on February 28th and August 31st of each of the first two years of program operation, the information required in 40 CFR 146.15, 146.25, and 146.35.

§ 122.37 [Amended]

b. Section 122.37 is amended by deleting paragraph (a) and substituting in lieu therefore the following:

(a) *Types of underground injection which may be authorized by rule.* The Director may authorize underground injection by rule as outlined in this paragraph.

(1) Injection into exisiting Class I, II (except existing enhanced recovery and hydrocarbon storage), and III wells may be authorized by rule for periods up to five years from the date of approval or promulgation of the UIC program. All such wells must be issued permits within the five year period.

(i) Rules under paragraph (a)(1) of this section shall specify that the authorization to inject shall exprire:

(A) Upon the effective date of the permit or permit denial, if a permit application has been filed in a timely manner as specified in § 122.38(b)(1);

(B) If a permit application has not been filed in a timely manner as specified in § 122.38(b)(1); or

(C) Unless a complete permit application is pending, not later than five years after the approval or promulgation of the UIC program.

(ii) Notwithstanding the prohibition in § 122.33, rules under paragraph (a)(1) of this section authorizing Class II and Class III operations or projects in existing injection fields may allow them to continue normal operations until permitted, including construction and operation of new injection wells as part of the operation, provided the owner or operator maintains compliance with all applicable requirements.

(iii) Rules under paragraph (a)(1) of this section shall apply, and ensure compliance no later than one year after authorization by such rules, with the following requirements applicable to permittees, except the terms "permit" and "permittee" shall be read to include rules and those authorized by rule:

(A) Section 122.41(a)—(exemption from rule where authorized by temporary permits);

(B) Section 122.41(b)—(retention of records);

(C) Section 122.41(d)—(reporting within 24 hours);

(D) Section 122.41(e)—(180 days notice of abandonment);

(E) Sections 122.42(f) and 146.10—(plugging and abandonment);

(F) Operating, monitoring, and reporting requirements (except mechanical integrity) under § 146.13 (Class I), § 146.23 (Class II) and § 146.33 (Class III);

(G) Section 122.42(g)—(financial responsibility); and

(H) Section 122.45(c)—(requirements for wells injecting hazardous waste) applicable to class I wells injecting hazardous waste only.

(2) Injection into existing Class II enhanced recovery and hydrocarbon storage wells may be authorized by rule for the life of the well or project.

(i) Such rules promulgated by the Director shall apply the following requirements applicable to Class II permittees, except that the terms "permit" and "permittee" shall be read to include rules and those authorized by rule:

(A) Section 122.41(a)—(exemption from rule where authorized by temporary permit);

(B) Section 122.41(b)—(retention of records);

(C) Section 122.41(d)—(reporting within 24 hours);

(D) Section 122.41(e)—(180 days notice of abandonment);

(E) Sections 122.42(f) and 146.10—(plugging and abandonment);

(F) Section 122.42(g)—(financial responsibility);

(G) Section 146.08—(mechanical integrity);

(H) Section 146.22—(construction requirements); and

(I) Section 146.23—(operating, monitoring and reporting requirements).

(ii) Such rules shall establish compliance schedules for achieving the construction requirements no later than three years and other requirements no later than one year after authorization.

(3) Injection into existing Class IV wells injecting directly into USDWs may be authorized for a period not to exceed six months after approval or promulgation of the UIC program. Such rules shall apply the requirements of § 122.45(c).

(4) Injection into Class V wells may be authorized by rule until requirements under future regulations become applicable.

c. Section 122.37 is further amended by deleting paragraph (b) and re-lettering paragraphs (c), (d) and (e) as paragraphs (b), (c) and (d).

d. Section 122.27 is further amended by deleting new paragraph (c)(1) and substituting in lieu thereof the following:

* * * * *

(c) * * *

(1) *Contents.* As part of the inventory, the Director shall require at least the following information:

(i) Facility name and location;

(ii) Name and address of legal contact;

(iii) Ownership of facility;

(iv) Nature and type of injection wells; and

(v) Operating status of injection wells.

(Note.—This information is requested on national form "Inventory of Injection Wells," OMB No. 158-R0170).

§ 122.41 [Amended]

e. Section 122.41 is amended by adding a new sentence at the end of paragraph (e) as follows:

* * * * *

(e) * * * With the notice, the permittee shall submit a revised plugging and abandonment plan updated as appropriate in compliance with § 122.42(f) and § 146.10.

§ 122.17 [Amended]

f. Section 122.17(f) is amended by adding a new paragraph (3) as follows:

(f) * * *

(3) Amend a plugging and abandonment plan which has been updated under § 122.41(e).

[FR Doc. 80-[illegible] Filed 6-2-80; 8:45 am]

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TAB M
EPA CONSOLIDATED PERMIT

federal register

Monday
May 19, 1980

Part X

Environmental Protection Agency

Consolidated Permit Regulations

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM; THE HAZARDOUS WASTE PERMIT PROGRAM; AND THE UNDERGROUND INJECTION CONTROL PROGRAM

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Authority: Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; and Clean Water Act, 33 U.S.C. § 1251 *et seq.*

Subpart A—Definitions and General Program Requirements

§ 122.1 What are the consolidated permit regulations?

(a) *Coverage.* (1) These consolidated permit regulations include provisions for five permit programs:

(i) The *Hazardous Waste Management* (HWM) Program under Subtitle C of the Solid Waste Disposal Act, as amended by the *Resource Conservation and Recovery Act of 1976* (RCRA) (Pub. L. 94–580, as amended by Pub. L. 95–609; 42 U.S.C. § 6901 *et seq.*);

(ii) The *Underground Injection Control* (UIC) Program under Part C of the *Safe Drinking Water Act* (SDWA) (Pub. L. 93–523, as amended by Pub. L. 95–190; 42 U.S.C. § 300f *et seq.*);

(iii) The *National Pollutant Discharge Elimination System* (NPDES) Program under sections 318, 402, and 405(a) of the *Clean Water Act* (CWA) (Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576; 33 U.S.C. § 1251 *et seq.*);

(iv) The *Dredge or Fill* (404) Program under section 404 of the *Clean Water Act*; and

(v) The *Prevention of Significant Deterioration* (PSD) Program under regulations implementing section 165 of the *Clean Air Act* (CAA), as amended. (Pub. L. 88–206 as amended; 42 U.S.C. § *7401 et seq.*)

(2) For the RCRA, UIC, and NPDES programs, these regulations cover basic EPA permitting requirements (Part 122), what a State must do to obtain approval to operate its program in lieu of a Federal program and minimum requirements for administering the approved State program (Part 123), and procedures for EPA processing of permit applications and appeals (Part 124). For the 404 program, these regulations include only the requirements which must be met for a State to administer its own program in lieu of the U.S. Army Corps of Engineers in "State regulated waters," and provisions for EPA vetoes of State issued 404 permits. For the PSD program, these regulations cover only procedures for EPA processing of PSD permits in Part 124.

(b) *Structure.* (1) *Coverage of Parts.* These consolidated permit regulations are incorporated into three Parts of Title 40 of the Code of Federal Regulations:

(i) *Part 122.* This Part contains definitions for all of the programs except PSD. It also contains basic permitting requirements for EPA-administered RCRA, UIC, and NPDES programs, such as application requirements, standard permit conditions, and monitoring and reporting requirements.

(ii) *Part 123.* This Part describes what States must do to obtain EPA approval of their RCRA, UIC, NPDES, or 404 programs. It also sets forth the minimum requirements for administering these permit programs after approval.

(iii) *Part 124.* This Part establishes the procedures for EPA issuance of RCRA, UIC, NPDES, and PSD permits. It also establishes the procedures for administrative appeals of EPA permit decisions.

(2) *Subparts.* Parts 122, 123, and 124 are each organized into subparts. Each Part has a general Subpart A which contains requirements that apply to all the programs covered by that Part. Additional subparts supplement these general provisions with requirements which apply to one or more specified programs. In case of any inconsistency between Subpart A and any program-specific subpart, the program-specific subpart is controlling.

(3) Certain requirements set forth in Parts 122 and 124 are made applicable to approved State programs, including State 404 programs, by reference in Part 123. These references are set forth in § 123.7. If a section or paragraph of Parts 122 or 124 is applicable to States, through reference in § 123.7, that fact is signaled by the following words at the end of the section or paragraph heading: *(applicable to State programs, see § 123.7).* If these words are absent, the section (or paragraph) applies only to EPA-administered permits.

(4) The structure and coverage of these regulations by program is indicated in the following chart. A permit applicant or permittee that is interested in finding out about only one of the programs covered by these regulations can use this chart to determine which regulations to read. If a State is the permitting authority, the applicant or permittee should read the State laws and program regulations which implement the requirements of Part 123 for the relevant program.

Program	Coverage		
	Part 122	Part 123	Part 124
RCRA	Subparts A and B	Subparts A, B, and F	Subparts A, B, E, and F.
UIC	Subparts A and C	Subparts A and C	Subparts A and F.
NPDES	Subparts A and D	Subparts A and D	Subparts A, D, E, and F.
404	Subpart A	Subparts A and E	Subpart A.
PSD	None	None	Subparts A, C, and F.

(c) *Relation to other requirements.* (1) *Consolidated permit application forms.* Applicants for EPA-issued RCRA Part A, UIC, NPDES, or PSD permits and persons seeking interim status under RCRA must submit their applications on EPA's consolidated permit application forms when available. (There will be no form for RCRA Part B applications and therefore no EPA application form is used. See § 122.25.) These forms, like these consolidated regulations, contain a general form covering all programs plus several program-specific forms. Although application forms have been consolidated, they, like permits, have been coordinated without losing their separate legal identities. There is no "consolidated permit." Each permit and application under a program is a separate document. Most of the information requested on these application forms (other than Form 5 for PSD) is required by these regulations. The essential information required in the general form (Form 1) is listed in § 122.4. The additional information required for RCRA Part A applications (Form 3) is listed in § 122.24, for UIC applications (Form 4) in § 122.37, and for NPDES applications (Forms 2a–d) in § 122.53. Applicants for State-issued permits must use State forms which must require at a minimum the information listed in these sections. All minimum information requirements for State 404 permit applications appear in § 123.94.

(2) *Technical regulations.* The five permit programs which are covered in these consolidated permit regulations each have separate additional regulations that contain technical requirements for those programs. These separate regulations are used by permit-issuing authorities to determine what requirements must be placed in permits if they are issued. These separate regulations are located as follows:

RCRA	40 CFR Parts 260–266.
UIC	40 CFR Part 146.
NPDES	40 CFR Parts 125, 129, 133, 136. 40 CFR Subchapter N (Parts 400–460).
404	40 CFR Part 230.
PSD	40 CFR Part 52.

(d) *Authority.* The consolidation of these permit programs into one set of regulations is authorized by sections 101(f) and 501(a) of CWA, sections 1006 and 2002 of RCRA, section 1450 of the SDWA, and section 301 of the CAA.

(e) *Public participation.* This rule establishes the requirements for public participation in EPA and State permit issuance, enforcement, and related variance proceedings; and in the approval of State RCRA, UIC, NPDES, and 404 programs. These requirements carry out the purposes of the public participation requirements of 40 CFR Part 25 (Public Participation), and supersede the requirements of that Part as they apply to actions covered under Parts 122, 123, and 124.

(f) *State authorities.* Nothing in Parts 122, 123, or 124 precludes more stringent State regulation of any activity covered by these regulations, whether or not under an approved State program, except as provided for the RCRA program in § 123.33 (requirement that State RCRA programs under final authorization be consistent with the Federal program and other State programs).

§ 122.2 Purpose and scope of Part 122.

(a) *Subpart A* of Part 122 contains definitions (§ 122.3) and basic permitting requirements (§§ 122.4 through 122.19). Definitions are given for the RCRA, UIC, NPDES, and State 404 programs. Definitions for EPA processing of PSD permits are in Part 124, Subpart C. The permitting requirements apply to EPA administered RCRA, UIC, and NPDES programs. (Permit program requirements for the Federal 404 program administered by the Corps of Engineers do not appear in these regulations but are found in 33 CFR Parts 320–327.) In addition, the permitting requirements apply to State-administered RCRA, UIC, NPDES, and 404 programs to the extent specified by cross-reference in § 123.7.

(b) *Subparts B, C, and D* contain additional requirements for RCRA, UIC and NPDES permitting, respectively. They apply to EPA, and to approved States to the extent specified by cross-reference in § 123.7.

§ 122.3 Definitions.

The following definitions apply to Parts 122, 123, and 124, except Part 124 coverage of the PSD program (see § 124.2). Terms not defined in this section have the meaning given by the appropriate Act. When a defined term appears in a definition, the defined term is sometimes placed within quotation marks as an aid to readers. When a definition applies primarily to one or more programs, those programs appear in parentheses after the defined term.

Acidizing (UIC) means the injection of acid through the borehole or "well" into a "formation" to increase permeability and porosity by dissolving the acid-soluble portion of the rock constituents.

Administrator means the Administrator of the United States Environmental Protection Agency, or an authorized representative.

Applicable standards and limitations (NPDES) means all State, interstate, and Federal standards and limitations to which a "discharge" or a related activity is subject under the CWA, including "effluent limitations," water quality standards, standards of performance, toxic effluent standards or prohibitions, "best management practices," and pretreatment standards under sections 301, 302, 303, 304, 306, 307, 308, 403, and 405 of CWA.

Application means the EPA standard national forms for applying for a permit, including any additions, revisions or modifications to the forms; or forms approved by EPA for use in "approved States," including any approved modifications or revisions. For RCRA, application also includes the information required by the Director under § 122.25 (contents of Part B of the RCRA application).

Appropriate Act and regulations means the Clean Water Act (CWA); the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA); or Safe Drinking Water Act (SDWA), whichever is applicable; and applicable regulations promulgated under those statutes. In the case of an "approved State program" appropriate Act and regulations includes State program requirements.

Approved program or *approved State* means a State or interstate program which has been approved or authorized by EPA under Part 123.

Aquifer (RCRA and UIC) means a geological "formation," group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

Area of reviw (UIC) means the area surrounding an "injection well" described according to the criteria set forth in § 146.06.

Average monthly discharge limitation (NPDES) means the highest allowable average of "daily discharges" over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

Average weekly discharge limitation (NPDES) means the highest allowable average of "daily discharges" over a calendar week, calculated as the sum of all daily discharges measured during a calendar week divided by the number of daily discharges measured during that week.

Best management practices ("BMPs") (NPDES and 404) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." For NPDES, BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. For State 404 programs, BMPs also include methods, measures, practices, or design and performance standards, which facilitate compliance with section 404(b)(1) environmental guidelines (40 CFR Part 230), effluent limitations or prohibitions under section 307(a), and applicable water quality standards.

BMPs (NPDES and 404) means "best management practices."

Closure (RCRA) means the act of securing a "Hazardous Waste Management facility" pursuant to the requirements of 40 CFR Part 264.

Contaminant (UIC) means any physical, chemical, biological, or radiological substance or matter in water.

Contiguous zone (NPDES) means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone.

Continuous discharge (NPDES) means a "discharge" which occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

CWA means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub. L. 92–500, as amended by Pub. L. 95–217 and Pub. L. 95–576; 33 U.S.C. § 1251 *et seq.*

Daily discharge (NPDS) means the "discharge of a pollutant" measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the "daily discharge" is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the "daily discharge" is calculated as the average measurement of the pollutant over the day.

Direct discharge (NPDES) means the "discharge of a pollutant."

Director means the Regional Administrator or the State Director, as the context requires, or an authorized representative. When there is no "approved State program," and there is an EPA administered program, "Director" means the Regional Administrator. When there is an approved State program, "Director" normally means the State Director. In some circumstances, however, EPA retains the authority to take certain actions even when there is an approved State program. (For example, when EPA has issued an NPDES permit prior to the approval of a State program, EPA may retain jurisdiction over that permit after program approval; see § 123.71.) In such cases, the term "Director" means the Regional Administrator and not the State Director.

Discharge (NPDES) when used without qualification means the "discharge of a pollutant."

Discharge of a pollutant (NPDES) means:

(a)(1) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(2) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

(b) This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works.

This term does not include an addition of pollutants by any "indirect discharger."

Discharge Monitoring Report ("DMR") (NPDES) means the EPA uniform national form, including any subsequent additions, revisions, or modifications, for the reporting of self-monitoring results by permitees. DMRs must be used by "approved States" as well as by EPA. EPA will supply DMRs to any approved State upon request. The EPA national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's.

Discharge of dredged material (404) means any addition from any "point source" of "dredged material" into "waters of the United States." The term includes the addition of dredged material into waters of the United States and the runoff or overflow from a contained land or water dredged material disposal area. Discharges of pollutants into waters of the United States resulting from the subsequent onshore processing of dredged material are not included within this term and are subject to the NPDES program even though the extraction and deposit of such material may also require a permit from the Corps of Engineers or the State section 404 program.

Discharge of fill material (404) means the addition from any "point source" of "fill material" into "waters of the United States." The term includes the following activities in waters of the United States: placement of fill that is necessary for the construction of any structure; the building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

Disposal (RCRA) means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any "hazardous waste" into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground water.

Disposal facility (RCRA) means a facility or part of a facility at which "hazardous waste" is intentionally placed into or on the land or water, and at which hazardous waste will remain after closure.

Disposal site (404) means that portion of the "waters of the United States" enclosed within fixed boundaries consisting of a bottom surface area and any overlaying volume of water. In the case of "wetland" on which water is not present, the disposal site consists of the wetland surface area. Fixed boundaries may consist of fixed geographic point(s) and associated dimensions, or of a discharge point and specific associated dimensions.

DMR (NPDES) means "Discharge Monitoring Report."

Draft permit means a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a "permit." A notice of intent to terminate a permit, and a notice of intent to deny a permit, as discussed in § 124.5, are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination, as discussed in § 124.5, is not a "draft permit." A "proposed permit" is not a "draft permit."

Drilling mud (UIC) means a heavy suspension used in drilling an "injection well," introduced down the drill pipe and through the drill bit.

Dredged material (404) means material that is excavated or dredged from "waters of the United States."

Effluent limitation (NPDES) means any restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

Effluent limitations guidelines (NPDES) means a regulation published by the Administrator under section 304(b) of CWA to adopt or revise "effluent limitations."

Effluents (404) means "dredged material" or "fill material," including return flow from confined sites.

Emergency permit means a RCRA, UIC, or State 404 "permit" issued in accordance with §§ 122.27, 122.40 or 123.96, respectively.

Environmental Protection Agency ("EPA") means the United States Environmental Protection Agency.

EPA means the United States "Environmental Protection Agency."

Exempted aquifer (UIC) means an "aquifer" or its portion that meets the criteria in the definition of "underground source of drinking water" but which has been exempted according to the procedures in § 122.35(b).

Existing HWM facility (RCRA) means a facility which was in operation or for which construction had commenced, on or before October 21, 1976. Construction had commenced if:

(a) The owner or operator had obtained all necessary Federal, State, and local preconstruction approvals or permits; and

(b)(1) A continuous physical, on-site construction program had begun, or

(2) The owner or operator had entered into contractual obligations—which cannot be cancelled or modified without substantial loss—for construction of the facility to be completed within a reasonable time.

[Note.—This definition reflects the literal language of the statute. However, EPA believes that amendments to RCRA now in conference will shortly be enacted and will change the date for determining when a facility is an "existing facility" to one no earlier than May of 1980; indications are that the conferees are considering October 30, 1980. Accordingly, EPA encourages every owner or operator of a facility which was built or under physical construction as of the promulgation date of these regulations to file Part A of its permit application so that it can be quickly processed for interim status when the change in the law takes effect. When those amendments are enacted, EPA will amend this definition.]

Existing injection well (UIC) means an "injection well" other than a "new injection well."

Facility or activity means any "HWM facility," UIC "injection well," NPDES "point source," or State 404 dredge or fill activity, or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

Fill material (404) means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

Final authorization (RCRA) means approval by EPA of a State program which has met the requirements of § 3006(b) of RCRA and the applicable requirements of Part 123, Subparts A and B.

Fluid (UIC) means any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

Formation (UIC) means a body of rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

Formation fluid (UIC) means "fluid" present in a "formation" under natural conditions as opposed to introduced fluids, such as "drilling mud."

General permit (NPDES and 404) means an NPDES or 404 "permit" authorizing a category of discharges under the CWA within a geographical area. For NPDES, a general permit means a permit issued under § 122.59. For 404, a general permit means a permit issued under § 123.95.

Generator (RCRA) means any person, by site location, whose act or process produces "hazardous waste" identified or listed in 40 CFR Part 261.

Ground water (RCRA and UIC) means water below the land surface in a zone of saturation.

Hazardous substance (NPDES) means any substance designated under 40 CFR Part 116 pursuant to section 311 of CWA.

Hazardous waste (RCRA and UIC) means a hazardous waste as defined in 40 CFR § 261.3.

Hazardous Waste Management facility ("HWM facility") means all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of "hazardous waste." A facility may consist of several "treatment," "storage," or "disposal" operational units (for example, one or more landfills, surface impoundments, or combinations of them).

HWM facility (RCRA) means "Hazardous Waste Management facility."

Indirect discharger (NPDES) means a nondomestic discharger introducing "pollutants" to a "publicly owned treatment works."

Injection well (RCRA and UIC) means a "well" into which "fluids" are being injected.

Injection zone (UIC) means a geological "formation," group of formations, or part of a formation receiving fluids through a "well."

In operation (RCRA) means a facility which is treating, storing, or disposing of "hazardous waste."

Interim authorization (RCRA) means approval by EPA of a State hazardous waste program which has met the requirements of § 3006(c) of RCRA and applicable requirements of Part 123, Subpart F.

Interstate agency means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the "appropriate Act and regulations."

Major facility means any RCRA, UIC, NPDES, or 404 "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director.

Manifest (RCRA and UIC) means the shipping document originated and signed by the "generator" which contains the information required by Subpart B of 40 CFR Part 262.

Maximum daily discharge limitation (NPDES) means the highest allowable "daily discharge."

Municipality (NPDES) means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal or sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of CWA.

National Pollutant Discharge Elimination System means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under sections 307, 402, 318, and 405 of CWA. The term includes an "approved program."

New discharger (NPDES) means any building, structure, facility, or installation:

(a)(1) From which there is or may be a new or additional "discharge of pollutants" at a "site" at which on October 18, 1972 it had never discharged pollutants; and

(2) Which has never received a finally effective NPDES "permit" for discharges at that site; and

(3) Which is not a "new source."

(b) This definition includes an "indirect discharger" which commences discharging into "waters of the United States." It also includes any existing mobile point source, such as an offshore oil drilling rig, seafood processing rig, seafood processing vessel, or aggregate plant, that begins discharging at a location for which it does not have an existing permit.

New HWM facility (RCRA) means a "Hazardous Waste Management facility" which began operation or for which construction commenced after October 21, 1976.

New injection well (UIC) means a "well" which began injection after a UIC program for the State applicable to the well is approved.

New source (NPDES) means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

(a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source; or

(b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

NPDES means "National Pollutant Discharge Elimination System."

Off-site (RCRA) means any site which is not "on-site."

On-site (RCRA) means on the same or geographically contiguous property which may be divided by public or private right(s)-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right(s)-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which the person controls and to which the public does not have access, is also considered on-site property.

Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the RCRA, UIC, NPDES, or 404 programs.

Permit means an authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this Part and Parts 123 and 124. "Permit" includes RCRA "permit by rule" (§ 122.26), UIC area permit (§ 122.39), NPDES or 404 "general permit" (§§ 122.59 and 123.95), and RCRA, UIC, or 404 "emergency permit" (§§ 122.27, 122.40, and 123.96). Permit does not include RCRA interim status (§ 122.23), UIC authorization by rule (§ 122.37), or any permit which has not yet been the subject of final agency action, such as a "draft permit" or a "proposed permit."

Permit by rule (RCRA) means a provision of these regulations stating that a "facility or activity" is deemed to have a RCRA permit if it meets the requirements of the provision.

Person means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

Phase I (RCRA) means that phase of the Federal hazardous waste management program commencing on the effective date of the last of the following to be initially promulgated: 40 CFR Parts 122, 123, 260, 261, 262, 263, and 265. Promulgation of Phase I refers to promulgation of the regulations necessary for Phase I to begin.

Phase II (RCRA) means that phase of Federal hazardous waste management program commencing on the effective date of the first Subpart of 40 CFR Part 264, Subparts F through R to be initially promulgated. Promulgation of Phase II refers to promulgation of the regulations necessary for Phase II to begin.

Physical construction (RCRA) means excavation, movement of earth, erection of forms or structures, or similar activity to prepare an "HWM facility" to accept "hazardous waste."

Plugging (UIC) means the act or process of stopping the flow of water, oil, or gas in "formations" penetrated by a borehole or "well."

Point source (NPDES and 404) means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel, or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

Pollutant (NPDES and 404) means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

[Note.—Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).]

POTW means "publicly owned treatment works."

Primary industry category (NPDES) means any industry category listed in the NRDC settlement agreement (*Natural Resources Defense Council et al.* v. *Train*, 8 E.R.C. 2120 (D.D.C. 1976), *modified* 12 E.R.C. 1833 (D.D.C. 1979); also listed in Appendix A of Part 122.

Privately owned treatment works (NPDES) means any device or system which is (a) used to treat wastes from any facility whose operator is not the operator of the treatment works and (b) not a "POTW."

Process wastewater (NPDES) means any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.

Proposed permit (NPDES) means a State NPDES "permit" prepared after the close of the public comment period (and, when applicable, any public hearing and administrative appeals) which is sent to EPA for review before final issuance by the State. A "proposed permit" is not a "draft permit."

Publicly owned treatment works ("POTW") means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a "State" or "municipality." This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

Radioactive waste (UIC) means any waste which contains radioactive material in concentrations which exceed those listed in 10 CFR Part 20, Appendix B, Table II, Column 2, or exceed the "Criteria for Identifying and Applying Characteristics of Hazardous Waste and for Listing Hazardous Waste" in 40 CFR Part 261, whichever is applicable.

RCRA means the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976 (Pub. L. 94–580, as amended by Pub. L. 95–609, 42 U.S.C. § 6901 *et seq.*).

Recommencing discharger (NPDES) means a source which recommences discharge after terminating operations.

Regional Administrator means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

Schedule of compliance means a schedule of remedial measures included in a "permit," including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the "appropriate Act and regulations."

SDWA means the Safe Drinking Water Act (Pub. L. 95–523, as amended by Pub. L. 95–1900; 42 U.S.C. § 300f *et seq.*).

Secondary industry category (NPDES) means any industry category which is not a "primary industry category."

Secretary (NPDES and 404) means the Secretary of the Army, acting through the Chief of Engineers.

Section 404 program or *State 404 program* or *404* means an "approved State program" to regulate the "discharge of dredged material" and the "discharge of fill material" under section 404 of the Clean Water Act in "State regulated waters."

Sewage from vessels (NPDES) means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under section 312 of CWA, except that with respect to commercial vessels on the Great Lakes this term includes graywater. For the purposes of this definition, "graywater" means galley, bath, and shower water.

Sewage sludge (NPDES) means the solids, residues, and precipitate separated from or created in sewage by the unit processes of a "publicly owned treatment works." "Sewage" as used in this definition means any wastes, including wastes from humans, households, commercial establishments, industries, and storm water runoff, that are discharged to or otherwise enter a publicly owned treatment works.

Site means the land or water area where any "facility or activity" is physically located or conducted, including adjacent land used in connection with the facility or activity.

State means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands (except in the case of RCRA), and the Commonwealth Northern Mariana Islands (except in the case of CWA).

State Director means the chief administrative officer of any State or interstate agency operating an "approved program," or the delegated representative of the State Director. If responsibility is divided among two or more State or interstate agencies, "State Director" means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

State/EPA Agreement means an agreement between the Regional Administrator and the State which coordinates EPA and State activities, responsibilities and programs including those under the RCRA, SDWA, and CWA programs.

State regulated waters (404) means those "waters of the United States" in which the Corps of Engineers suspends the issuance of section 404 permits upon approval of a State's section 404 permit program by the Administrator under section 404(h). These waters shall be identified in the program description as required by § 123.4(h)(1). The Secretary shall retain jurisdiction over the following waters (see CWA section 404(g)(1)):

(a) Waters which are subject to the ebb and flow of the tide;

(b) Waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark; and

(c) "Wetlands" adjacent to waters in (a) and (b).

Storage (RCRA) means the holding of "hazardous waste" for a temporary period, at the end of which the hazardous waste is treated, disposed, or stored elsewhere.

Stratum (plural *strata*) (UIC) means a single sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock material.

Total dissolved solids (UIC and NPDES) means the total dissolved (filterable) solids as determined by use of the method specified in 40 CFR Part 136.

Toxic pollutant (NPDES and 404) means any pollutant listed as toxic under section 307(a)(1) of CWA.

Transporter (RCRA) means a person engaged in the off-site transportation of "hazardous waste" by air, rail, highway or water.

Treatment (RCRA) means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any "hazardous waste" so as to neutralize such wastes, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous, or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

UIC means the Underground Injection Control program under Part C of the Safe Drinking Water Act, including an "approved program."

Underground injection (UIC) means a "well injection."

Underground source of drinking water ("USDW") (RCRA and UIC) means an "aquifer" or its portion:

(a)(1) Which supplies drinking water for human consumption; or

(2) In which the ground water contains fewer than 10,000 mg/l "total dissolved solids;" and

(b) Which is not an "exempted aquifer."

USDW (RCRA and UIC) means "underground source of drinking water."

Variance (NPDES) means any mechanism or provision under sections 301 or 316 of CWA or under 40 CFR Part 125, or in the applicable "effluent limitations guidelines" which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

Waters of the United States or *Waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (1)-(4) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)-(f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

Well (UIC) means a bored, drilled or driven shaft, or a dug hole, whose depth is greater than the largest surface dimension.

Well injection (UIC) means the subsurface emplacement of "fluids" through a bored, drilled, or driven "well;" or through a dug well, where the depth of the dug well is greater than the largest surface dimension.

Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

§ 122.4 Application for a permit.

(Applicable to State programs, see § 123.7.)

(a) *Permit application.* Any person who is required to have a permit (including new applicants and permittees with expiring permits) shall complete, sign, and submit an application to the Director as described in this section and in §§ 122.23 (RCRA), 122.38 (UIC), 122.53 (NPDES), and 123.94 (404). Persons currently authorized with interim status under RCRA (§ 122.23) or UIC authorization by rule (§ 122.37) shall apply for permits when required by the Director. Persons covered by RCRA permits by rule (§ 122.26), and NPDES or 404 dischargers covered by general permits under § 122.59 or 123.97, respectively, need not apply. Procedures for applications, issuance and administration of emergency permits are found exclusively in §§ 122.27 (RCRA), 122.40 (UIC), and 123.96 (404).

(b) *Who applies?* When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that for RCRA only, the owner must also sign the permit application.

(c) *Completeness.* The Director shall not issue a permit under a program before receiving a complete application for a permit under that program except for NPDES and 404 general permits, RCRA permits by rule, or emergency permits. An application for a permit under a program is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. For EPA—administered RCRA, UIC, and NPDES programs, an application which is reviewed under § 124.3 is complete when the Director receives either a complete application or the information listed in a notice of deficiency.

(d) *Information requirements.* All applicants for RCRA, UIC, or NPDES permits (for State 404 permits see § 123.94) shall provide the following information to the Director, using the application form provided by the Director (additional information required of applicants is set forth in §§ 122.24 and 122.25 (RCRA), 122.38 (UIC), and 122.53 (NPDES)).

(1) The activities conducted by the applicant which require it to obtain permits under RCRA, UIC, NPDES, or PSD.

(2) Name, mailing address, and location of the facility for which the application is submitted.

(3) Up to four SIC codes which best reflect the principal products or services provided by the facility.

(4) The operator's name, address, telephone number, ownership status, and status as Federal, State, private, public, or other entity.

(5) Whether the facility is located on Indian lands.

(6) A listing of all permits or construction approvals received or applied for under any of the following programs:

(i) Hazardous Waste Management program under RCRA.

(ii) UIC program under SDWA.

(iii) NPDES program under CWA.

(iv) Prevention of Significant Deterioration (PSD) program under the Clean Air Act.

(v) Nonattainment program under the Clean Air Act.

(vi) National Emission Standards for Hazardous Pollutants (NESHAPS) preconstruction approval under the Clean Air Act.

(vii) Ocean dumping permits under the Marine Protection Research and Sanctuaries Act.

(viii) Dredge or fill permits under section 404 of CWA.

(ix) Other relevant environmental permits, including State permits.

(7) A topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

(8) A brief description of the nature of the business.

(e) *Recordkeeping.* Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under §§ 122.4(d), 122.24, and 122.25 (RCRA); 122.38 (UIC); 122.53 (NPDES); and 123.94 (404) for a period of at least 3 years from the date the application is signed.

§ 122.5 Continuation of expiring permits.

(a) *EPA permits.* When EPA is the permit-issuing authority, the conditions of an expired permit continue in force under 5 U.S.C. § 558(c) until the effective date of a new permit (see § 124.15) if:

(1) The permittee has submitted a timely application under §§ 122.25 (RCRA), 122.38 (UIC), or 122.53 (NPDES) which is a complete (under § 122.4(c)) application for a new permit; and

(2) The Regional Administrator, through no fault of the permittee, does not issue a new permit with an effective date under § 124.15 on or before the expiration date of the previous permit (for example, when issuance is impracticable due to time or resource constraints).

(b) *Effect.* Permits continued under this section remain fully effective and enforceable.

(c) *Enforcement.* When the permittee is not in compliance with the conditions of the expiring or expired permit the Regional Administrator may choose to do any or all of the following:

(1) Initiate enforcement action based upon the permit which has been continued;

(2) Issue a notice of intent to deny the new permit under § 124.6. If the permit is denied, the owner or operator would then be required to cease the activities authorized by the continued permit or be subject to enforcement action for operating without a permit;

(3) Issue a new permit under Part 124 with appropriate conditions; or

(4) Take other actions authorized by these regulations.

(d) *State continuation.*

(1) An EPA 1 (or, in the case of 404, Corps of Engineers) issued permit does not continue in force beyond its expiration date under Federal law if at that time a State is the permitting authority. States authorized to administer the RCRA, UIC, NPDES or 404 programs may continue either EPA (or Corps of Engineers) or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the facility or activity is operating without a permit from the time of expiration of the old permit to the effective date of the State-issued new permit.

§ 122.6 Signatories to permit applications and reports.

(Applicable to State programs, see § 123.7.)

(1) *Applications.* All permit applications, except those submitted for Class II wells under the UIC program (see paragraph (b) of this section), shall be signed as follows:

(1) *For a corporation:* by a principal executive officer of at least the level of vice-president;

(2) *For a partnership or sole proprietorship:* by a general partner or the proprietor, respectively; or

(3) *For a municipality, State, Federal, or other public agency:* by either a principal executive officer or ranking elected official.

(b) *Reports.* All reports required by permits, other information requested by the Director, and all permit applications submitted for Class II wells under § 122.38 for the UIC program shall be signed by a person described in paragraph (a) of this section, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(1) The authorization is made in writing by a person described in paragraph (a) of this section;

(2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility. (A duly authorized representative may thus be either a named individual or any individual occupying a named position.); and

(3) The written authorization is submitted to the Director.

(c) *Changes to authorization.* If an authorization under paragraph (b) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph (b) of this section must be submitted to the Director prior to or together with any reports, information, or applications to be signed by an authorized representative.

(d) *Certification.* Any person signing a document under paragraphs (a) or (b) of this section shall make the following certification:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

§ 122.7 Conditions applicable to all permits.

(Applicable to State programs, see § 123.7.)

The following conditions apply to all RCRA, UIC, NPDES, and 404 permits. For additional conditions applicable to all permits for each of the programs individually, see sections 122.28 (RCRA), 122.41 (UIC), 122.60 and 122.61 (NPDES) and 123.97 (404). All conditions applicable to all permits, and all additional conditions applicable to all permits for individual programs, shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

(a) *Duty to comply.* The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the appropriate Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

(b) *Duty to reapply.* If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

(c) *Duty to halt or reduce activity.* It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(d) *Duty to mitigate.* The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

(e) *Proper operation and maintenance.* The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems *only* when necessary to achieve compliance with the conditions of the permit.

(f) *Permit actions.* This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

(g) *Property rights.* This permit does not convey any property rights of any sort, or any exclusive privilege.

(h) *Duty to provide information.* The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Director, upon request, copies of records required to be kept by this permit.

(i) *Inspection and entry.* The permittee shall allow the Director, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

(1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

(2) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

(3) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

(4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the appropriate Act, any substances or parameters at any location.

(j) *Monitoring and records.*

(1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

(ii) The individual(s) who performed the sampling or measurements;

(iii) The date(s) analyses were performed;

(iv) The individual(s) who performed the analyses;

(v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(k) *Signatory requirement.* All applications, reports, or information submitted to the Director shall be signed and certified. (See § 122.6.)

(l) *Reporting requirements.* (1) *Planned changes.* The permittee shall give notice to the Director as soon as possible of any planned physical alternations or additions to the permitted facility.

(2) *Anticipated noncompliance.* The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

(3) *Transfers.* This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the appropriate Act. (See § 122.14; in some cases, modification or revocation and reissuance is mandatory.)

(4) *Monitoring reports.* Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(5) *Compliance schedules.* Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

(6) *Twenty-four hour reporting.* The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

(7) *Other noncompliance.* The permittee shall report all instances of noncompliance not reported under paragraphs (1)(4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraph (l)(6) of this section.

(8) *Other information.* Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

§ 122.8 Establishing permit conditions.

(Applicable to State programs, see § 122.7.)

(a) *All programs.* In addition to conditions required in all permits for all programs (§ 122.7), the Director shall establish conditions, as required on a case-by-case basis, in permits for all programs under §§ 122.9 (duration of permits), 122.10(a) (schedules of compliance), 122.11 (monitoring), and for EPA permits only 122.10(b) (alternate schedules of compliance) and 122.12 (considerations under Federal law).

(b) *Individual programs.*

(1) In addition to conditions required in all permits for a particular program (§§ 122.28 for RCRA, 122.41 for UIC, 122.60 and 122.61 for NPDES, and 123.97 for 404), the Director shall establish conditions in permits for the individual programs, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the appropriate Act and regulations.

(2) For a State issued permit, an applicable requirement is a State statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit. For a permit issued by EPA, an

applicable requirement is a statutory or regulatory requirement (including any interim final regulation) which takes effect prior to the issuance of the permit (except as provided in § 124.86(c) for RCRA, UIC and NPDES permits being processed under Subparts E or F of Part 124). Section 124.14 (reopening of comment period) provides a means for reopening EPA permit proceedings at the discretion of the Director where new requirements become effective during the permitting process and are of sufficient magnitude to make additional preceedings desirable. For State and EPA administered programs, an applicable requirement is also any requirement which takes effect prior to the modification or revocation and reissuance of a permit, to the extent allowed in § 122.15.

(3) New or reissued permits, and to the extent allowed under § 122.15 modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in §§ 122.29 (RCRA), 122.42 (UIC), 122.62 and 122.63 (NPDES), and 123.98 (404).

(c) *Incorporation.* All permit conditions shall be incorporated either expressly or by reference. If incorporated by reference, a specific citation to the applicable regulations or requirements must be given in the permit.

§ 122.9 Duration of permits.

(Applicable to State programs, see § 123.7.)

(a) *NPDES and section 404.* NPDES and section 404 permits shall be effective for a fixed term not to exceed 5 years.

(b) *RCRA.* RCRA permits shall be effective for a fixed term not to exceed 10 years. (See also § 122.30 (interim permits for UIC wells)).

(c) *UIC.* UIC permits for Class I and Class V wells shall be effective for a fixed term not to exceed 10 years. UIC permits for Class II and III wells shall be issued for a period up to the operating life of the facility. The Director shall review each issued Class II or III well UIC permit at least once every 5 years to determine whether it should be modified, revoked and reissued, terminated, or a minor modification made as provided in §§ 122.15, 122.16, and 122.17.

(d) Except as provided in § 122.5, the term of a permit shall not be extended by modification beyond the maximum duration specified in this section.

(e) The Director may issue any permit for a duration that is less than the full allowable term under this section.

§ 122.10 Schedules of compliance.

(a) *General (applicable to State programs, see § 123.7).* The permit may, when appropriate, specify a schedule of compliance leading to compliance with the appropriate Act and regulations.

(1) *Time for compliance.* Any schedules of compliance under this section shall require compliance as soon as possible.

(i) *For NPDES,* in addition, schedules of compliance shall require compliance not later than the applicable statutory deadline under the CWA.

(ii) *For UIC,* in addition, schedules of compliance shall require compliance not later than 3 years after the effective date of the permit.

(2) *For NPDES only.* The first NPDES permit issued to a new source, a new discharger which commenced discharge after August 13, 1979, or a recommencing discharger shall not contain a schedule of compliance under this section. See also § 122.66(d)(4).

(3) *Interim dates.* Except as provided in paragraph (b)(1)(ii) of this section, if a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.

(i) The time between interim dates shall not exceed 1 year.

(ii) If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

[Note.—Examples of interim requirements include: (1) submit a complete Step 1 construction grant (for POTWs); (2) let a contract for construction of required facilities; (3) commence construction of required facilities; (4) complete construction of required facilities.]

(4) *Reporting.* The permit shall be written to require that no later than 14 days following each interim date and the final date of compliance, the permittee shall notify the director in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports if paragraph (a)(1)(ii) of this section is applicable.

(b) *Alternative schedules of compliance.* A RCRA, UIC, or NPDES permit applicant or permittee may cease conducting regulated activities (by receiving a terminal volume of hazardous waste for HWM facilities, plugging and abandonment for UIC wells, or termination of direct discharge for NPDES sources) rather than continue to operate and meet permit requirements as follows:

(1) If the permittee decides to cease conducting regulated activities at a given time within the term of a permit which has already been issued:

(i) The permit may be modified to contain a new or additional schedule leading to timely cessation of activities; or

(ii) The permittee shall cease conducting permitted activities before noncompliance with any interim or final compliance schedule requirement already specified in the permit.

(2) If the decision to cease conducting regulated activities is made before issuance of a permit whose term will include the termination date, the permit shall contain a schedule leading to termination which will ensure timely compliance with applicable requirements, or for NPDES, compliance no later than the statutory deadline.

(3) If the permittee is undecided whether to cease conducting regulated activities, the Director may issue or modify a permit to contain two schedules as follows:

(i) Both schedules shall contain an identical interim deadline requiring a final decision on whether to cease conducting regulated activities no later than a date which ensures sufficient time to comply with applicable requirements in a timely manner if the decision is to continue conducting regulated activities;

(ii) One schedule shall lead to timely compliance with applicable requirements, and for NPDES, compliance no later than the statutory deadline;

(iii) The second schedule shall lead to cessation of regulated activities by a date which will ensure timely compliance with applicable requirements, or for NPDES, compliance no later than the statutory deadline.

(iv) Each permit containing two schedules shall include a requirement that after the permittee has made a final decision under paragraph (b)(3)(i) of this section it shall follow the schedule leading to compliance if the decision is to continue conducting regulated activities, and follow the schedule leading to termination if the decision is to cease conducting regulated activities.

(4) The applicant's or permittee's decision to cease conducting regulated activities shall be evidenced by a firm public commitment satisfactory to the Director, such as a resolution of the board of directors of a corporation.

§ 122.11 Requirements for recording and reporting of monitoring results.

(Applicable to State programs, see § 123.7.)

All permits shall specify:

(a) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);

(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

(c) Applicable reporting requirements based upon the impact of the regulated activity and as specified in Parts 264 and 266 (RCRA), Part 146 (UIC), § 122.62 (NPDES), and, when applicable, 40 CFR Part 230 (404). Reporting shall be no less frequent than specified in the above regulations.

§ 122.12 Considerations under Federal law.

Permits shall be issued in a manner and shall contain conditions consistent with requirements of applicable Federal laws. These laws may include:

(a) The *Wild and Scenic Rivers Act*, 16 U.S.C. 1273 *et seq.* Section 7 of the Act prohibits the Regional Administrator from assisting by license or otherwise the construction of any water resources project that would have a direct, adverse effect on the values for which a national wild and scenic river was established.

(b) The *National Historic Preservation Act of 1966*, 16 U.S.C. 470 *et seq.* Section 106 of the Act and implementing regulations (36 CFR Part 800) require the Regional Administrator, before issuing a license, to adopt measures when feasible to mitigate potential adverse effects of the licensed activity and properties listed or eligible for listing in the National Register of Historic Places. The Act's requirements are to be implemented in cooperation with State Historic Preservation Officers and upon notice to, and when appropriate, in consultation with the Advisory Council on Historic Preservation.

(c) The *Endangered Species Act*, 16 U.S.C. 1531 *et seq.* Section 7 of the Act and implementing regulations (50 CFR Part 402) require the Regional Administrator to ensure, in consultation with the Secretary of the Interior or Commerce, that any action authorized by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat.

(d) The *Coastal Zone Management Act*, 16 U.S.C. 1451 *et seq.* Section 307(c) of the Act and implementing regulations (15 CFR Part 930) prohibit EPA from issuing a permit for an activity affecting land or water use in the coastal zone until the applicant certifies that the proposed activity complies with the State Coastal Zone Management program, and the State or its designated agency concurs with the certification (or the Secretary of Commerce overrides the State's nonconcurrence).

(e) The *Fish and Wildlife Coordination Act*, 16 U.S.C. 661 *et seq.*, requires that the Regional Administrator, before issuing a permit proposing or authorizing the impoundment (with certain exemptions), diversion, or other control or modification of any body of water, consult with the appropriate State agency exercising jurisdiction over wildlife resources to conserve those resources.

(f) *Executive orders.* (Reserved.)

(g) *For NPDES only*, the National Environmental Policy Act, 33 U.S.C. 4321 *et seq.*, may require preparation of an Environmental Impact Statement and the inclusion of EIS-related permit conditions, as provided in § 122.67(c).

§ 122.13 Effect of a permit.

(a) *(Applicable to State programs, see § 123.7(a)).* Except for Class II and III wells under UIC, and except for any toxic effluent standards and prohibitions imposed under section 307 of the CWA for NPDES, compliance with a permit during its term constitutes compliance, for purposes of enforcement, with Subtitle C of RCRA, Part C of SWDA, sections 301, 302, 306, 307, 318, 403, and 405 of CWA for NPDES, and sections 301, 307, and 403 of CWA for 404. However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in §§ 122.15 and 122.16.

(b) *(Applicable to State programs, see § 123.7(a).)* The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

(c) The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.

§ 122.14 Transfer of permits.

(Applicable to State programs, see § 122.7.)

(a) *Transfers by modification.* Except as provided in paragraph (b) of this section, a permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued (under § 122.15(b)(2)), or a minor modification made (under § 122.17(d)), to identify the new permittee and incorporate such other requirements as may be necessary under the appropriate Act.

(b) *Automatic transfers.* As an alternative to transfers under paragraph (a) of this section, any NPDES permit or UIC permit for a well not injecting hazardous waste may be automatically transferred to a new permittee if:

(1) The current permittee notifies the Director at least 30 days in advance of the proposed transfer date in paragraph (b)(2) of this section;

(2) The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them and, in the case of UIC permits, the notice demonstrates that the financial responsibility requirements of § 122.42(g) will be met by the new permittee; and

(3) The Director does not notify the existing permittee and the proposed new permittee of his or her intent to modify or revoke and reissue the permit. A modification under this subparagraph may also be a minor modification under § 122.17. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in paragraph (b)(2) of this section.

§ 122.15 Modification or revocation and reissuance of permits.

(Applicable to State programs, see § 123.7).

When the Director receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see § 122.7), receives a request for modification or revocation and reissuance under § 124.5, or conducts a review of the permit file) he or she may determine whether or not one or more of the causes listed in paragraphs (a) and (b) of this section for modification or revocation and reissuance or both exist. If cause exists, the Director may modify or revoke and reissue the permit accordingly, subject to the limitations of paragraph (c) of this section, and may request an updated application if necessary. When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. See § 124.5(c)(2). If cause does not exist under this section or § 122.17, the Director shall not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in § 122.17 for "minor modifications" the permit may be modified without a draft permit or public review. Otherwise, a draft permit must be prepared and other procedures in Part 124 (or procedures of an approved State program) followed.

(a) *Causes for modification.* The following are causes for modification but not revocation and reissuance of permits. However, for Class II or III wells under UIC, the following may be causes for revocation and reissuance as well as modification; and the following may be causes for revocation and reissuance as well as modification under any program when the permittee requests or agrees.

(1) *Alterations.* There are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

[Note.—For NPDES, certain reconstruction activities may cause the new source provisions of § 122.67 to be applicable.]

(2) *Information.* The Director has received information. Permits other than for UIC Class II and III wells may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance. For UIC area permits (§ 122.39), NPDES general permits (§ 122.59) and 404 general permits (§ 123.95) this cause shall include any information indicating that cumulative effects on the environment are unacceptable.

(3) *New regulations.* The standards or regulations on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued. Permits other than for UIC Class II or III wells may be modified during their terms for this cause only as follows:

(i) For promulgation of amended standards or regulations, when:

(A) The permit condition requested to be modified was based on a promulgated Part 260–266 (RCRA) or Part 146 (UIC) regulation, or a promulgated effluent limitation guideline or EPA approved or promulgated water quality standard (NPDES); and

(B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based, or has approved a State action with regard to a water quality standard on which the permit condition was based; and

(C) A permittee requests modification in accordance with § 124.5 within ninety (90) days after **Federal Register** notice of the action on which the request is based.

(ii) For judicial decisions, a court of competent jurisdiction has remanded and stayed EPA promulgated regulations or effluent limitation guidelines, if the remand and stay concern that portion of the regulations or guidelines on which the permit condition was based and a request is filed by the permittee in accordance with § 124.5 within ninety (90) days of judicial remand.

(iii) For changes based upon modified State certifications of NPDES permits, see § 124.55(b).

(4) *Compliance schedules.* The Director determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy. However, in no case shall an NPDES compliance schedule be modified to extend beyond an applicable CWA statutory deadline. See also § 122.17(c) (minor modifications) and paragraph (a)(5)(xi) of this section (NPDES innovative technology).

(5) *For NPDES only,* the Director may modify a permit:

(i) When the permittee has filed a request for a variance under CWA sections 301(c), 301(g), 301(h), 301(i), 301(k), or 316(a), or for "fundamentally different factors" within the time specified in § 122.53, and the Director processes the request under the applicable provisions of §§ 124.61, 124.62, and 124.64.

(ii) When required to incorporate an applicable 307(a) toxic effluent standard or prohibition (see § 122.62(b)).

(iii) When required by the "reopener" conditions in a permit, which are established in the permit under § 122.62(b) (for CWA toxic effluent limitations) or 40 CFR § 403.10(e) (pretreatment program).

(iv) Upon request of a permittee who qualifies for effluent limitations on a net basis under § 122.63(h).

(v) When a discharger is no longer eligible for net limitations, as provided in § 122.63(h)(1)(ii)(B).

(vi) As necessary under 40 CFR § 403.8(e) (compliance schedule for development of pretreatment program).

(vii) Upon failure of an approved State to notify, as required by section 402(b)(3), another State whose waters may be affected by a discharge from the approved State.

(viii) When the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c).

(ix) When the permittee begins or expects to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application under § 122.53(d)(9).

(x) To establish a "notification level" as provided in § 122.62(f).

(xi) To modify a schedule of compliance to reflect the time lost during construction of an innovative or alternative facility, in the case of a POTW which has received a grant under section 202(a)(3) of CWA for 100% of the costs to modify or replace facilities constructed with a grant for innovative and alternative wastewater technology under section 202(a)(2). In no case shall the compliance schedule be modified to extend beyond an applicable CWA statutory deadline for compliance.

(6) *For 404 only,* the Director shall modify a permit to reflect toxic effluent standards or prohibitions or water quality standards, under the "reopener" condition of § 123.97(g).

(b) *Causes for modification or revocation and reissuance.* The following are causes to modify or, alternatively, revoke and reissue a permit:

(1) Cause exists for termination under § 122.16, and the Director determines that modification or revocation and reissuance is appropriate.

(2) The Director has received notification (as required in the permit, see § 122.17(1)(3)) of a proposed transfer of the permit. A permit also may be modified to reflect a transfer after the effective date of an automatic transfer (§ 122.14(b)) but will not be revoked and reissued after the effective date of the transfer except upon the request of the new permittee.

(c) *Facility siting.* For RCRA and UIC, suitability of the facility location will not be considered at the time of permit modification or revocation and reissuance unless new information or standards indicate that a threat to human health or the environment exists which was unknown at the time of permit issuance.

§ 122.16 Termination of permits.

(Applicable to State programs, see § 122.7.)

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

(1) Noncompliance by the permittee with any condition of the permit;

(2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or

(3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination.

(4) *For NPDES and 404 only,* permits may be modified or terminated when there is a change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

(b) The Director shall follow the applicable procedures in Part 124 or State procedures in terminating any RCRA, UIC, NPDES, or 404 permit under this section.

§ 122.17 Minor modifications of permits.

Upon the consent of the permittee, the Director may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of Part 124. Any permit modification not processed as a minor modification under this section must be made for cause and with Part 124 draft permit and public notice as required in § 122.15. Minor modifications may only:

(a) Correct typographical errors;

(b) Require more frequent monitoring or reporting by the permittee;

(c) Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement; or

(d) Allow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director.

(e) *For RCRA only,* change the lists of facility emergency coordinators or equipment in the permit's contingency plan.

(f) *For UIC only,*

(1) Change quantities or types of fluids injected which are within the capacity of the facility as permitted and, in the judgment of the Director, after reviewing information required under §§ 146.16, 146.26 and 146.36, would not interfere with the operation of the facility or its ability to meet conditions prescribed in the permit, and would not change its classification.

(2) Change construction requirements approved by the Director pursuant to § 122.42(a) (establishing UIC permit conditions), provided that any such alteration shall comply with the requirements of this Part and Part 146.

(g) *For NPDES only,*

(1) Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge under § 122.66.

(2) Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.

(h) *For 404 only,* extend the term of a State section 404 permit, so long as the modification does not extend the term of the permit beyond 5 years from its original effective date.

§ 122.18 Noncompliance and program reporting by the Director.

(Applicable to State programs, see § 123.7.)

The Director shall prepare quarterly and annual reports as detailed below. When the State is the permit-issuing authority, the State Director shall submit any reports required under this section to the Regional Administrator. When EPA is the permit-issuing authority, the Regional Administrator shall submit any report required under this section to EPA Headquarters. For purposes of this section only, RCRA permittees shall include RCRA interim status facilities, when appropriate.

(a) *Quarterly reports for RCRA, UIC, and NPDES.* The Director shall submit quarterly narrative reports for major facilities as follows:

(1) *Format.* The report shall use the following format:

(i) Provide separate lists for RCRA, UIC, and NPDES permittees; the NPDES permittees shall be further subcategorized as non-POTWs, POTWs, and Federal permittes;

(ii) For facilities or activities with permits under more than one program, provide an additional list combining information on noncompliance for each such facility;

(iii) Alphabetize each list by permittee name. When two or more permittees have the same name, the lowest permit number shall be entered first.

(iv) For each entry on a list, include the following information in the following order:

(A) Name, location, and permit number of the noncomplying permittee.

(B) A brief description and date of each instance of noncompliance for that permittee. Instances of noncompliance may include one or more of the kinds set forth in paragraph (a)(2) of this section. When a permittee has noncompliance of more than one kind under a single program, combine the information into a single entry for each such permittee.

(C) The date(s) and a brief description of the action(s) taken by the Director to ensure compliance.

(D) Status of the instance(s) of noncompliance with the date of the review of the status or the date of resolution.

(E) Any details which tend to explain or mitigate the instance(s) of noncompliance.

(2) *Instances of noncompliance to be reported.* Any instances of noncompliance within the following categories shall be reported in successive reports until the noncompliance is reported as resolved. Once noncompliance is reported as resolved it need not appear in subsequent reports.

(i) *Failure to complete construction elements.* When the permittee has failed to complete, by the date specified in the permit, an element of a compliance schedule involving either planning for construction (for example, award of a contract, preliminary plans), or a construction step (for example, begin construction, attain operation level); and the permittee has not returned to compliance by accomplishing the required element of the schedule within 30 days from the date a compliance schedule report is due under the permit.

(ii) *Modifications to schedules of compliance.* When a schedule of compliance in the permit has been modified under §§ 122.15 or 122.17 because of the permittee's noncompliance.

(iii) *Failure to complete or provide compliance schedule or monitoring reports.* When the permittee has failed to complete or provide a report required in a permit compliance schedule (for example, progress report or notice of noncompliance or compliance) or a monitoring report; and the permittee has not submitted the complete report within 30 days from the date it is due under the permit for compliance schedules, or from the date specified in the permit for monitoring reports.

(iv) *Deficient reports.* When the required reports provided by the permittee are so deficient as to cause misunderstanding by the Director and thus impede the review of the status of compliance.

(v) *Noncompliance with other permit requirements.* Noncompliance shall be reported in the following circumstances:

(A) Whenever the permittee has violated a permit requirement (other than reported under paragraphs (a)(2) (i) or (ii) of this section), and has not returned to compliance within 45 days from the date reporting of noncompliance was due under the permit; or

(B) When the Director determines that a pattern of noncompliance exists for a major facility permittee over the most recent four consecutive reporting periods. (*For NPDES only,* this pattern of noncompliance is based on violations of monthly averages and excludes parameters where there is continuous monitoring.) This pattern includes any violation of the same requirement in two consecutive reporting periods, and any violation of one or more requirements in each of four consecutive reporting periods; or

(C) When the Director determines significant permit noncompliance or other significant event has occurred, such as a discharge of a toxic or hazardous substance by an NPDES facility, a fire or explosion at an RCRA facility, or migration of fluids into a USDW.

(vi) *All other.* Statistical information shall be reported quarterly on all other instances of noncompliance by major facilities with permit requirements not otherwise reported under paragraph (a) of this section.

(3) *For RCRA only,* the Director shall submit, in a manner and form prescribed by the Administrator, quarterly reports concerning noncompliance by transporters (for example, recordkeeping requirements), and by generators that send their wastes to off-site treatment, storage, or disposal facilities.

(b) *Quarterly reports for State 404 programs.* The Director shall submit noncompliance reports for section 404 discharges specified under § 123.6(f)(1)(i) (A)–(E) containing the following information:

(1) Name, location, and permit number of each noncomplying permittee;

(2) A brief description and date of each instance of noncompliance, which should include the following:

(i) Any unauthorized discharges of dredged or fill material subject to the State's jurisdiction or any noncompliance with permit conditions; and

(ii) A description of investigations conducted and of any enforcement actions taken or contemplated.

(c) *Annual reports for RCRA, UIC, and NPDES.*

(1) *Annual noncompliance report.* Statistical reports shall be submitted by the Director on nonmajor RCRA, UIC, and NPDES permittees indicating the total number reviewed, the number of noncomplying nonmajor permittees, the number of enforcement actions, and number of permit modifications extending compliance deadlines. The statistical information shall be organized to follow the types of noncompliance listed in paragraph (a) of this section.

(2) *For NPDES only,* a separate list of nonmajor discharges which are one or more years behind in construction phases of the compliance schedule shall also be submitted in alphabetical order by name and permit number.

(3) *For RCRA only,* in addition to the annual noncompliance report, the Director shall prepare a "program report" which contains information (in a manner and form prescribed by the Administrator) on generators and transporters; the permit status of regulated facilities; and summary information on the quantities and types of hazardous wastes generated, transported, stored, treated, and disposed during the preceding year. This summary information shall be reported according to EPA characteristics and lists of hazardous wastes at 40 CFR Part 261.

(4) *For State-administered UIC programs only,* in addition to the annual noncompliance report, the State Director shall:

(i) Submit each year a program report to the Administrator (in a manner and form prescribed by the Administrator) consisting of:

(A) A detailed description of the State's implementation of its program;

(B) Suggested changes if any to the program description (see § 123.4(f)) which are necessary to more accurately reflect the State's progress in issuing permits;

(C) An updated inventory of active underground injection operations in the State.

(iii) In addition to complying with the requirements of paragraph (c)(4)(i) of this section the State Director shall provide the Administrator within 3 months of the completion of the second full year of State operation of the UIC program a supplemental report containing the information required in 40 CFR Part 146 on corrective actions taken by operators of new Class II wells based upon these regulations.

(d) *Annual reports for State 404 programs.* The State Director shall submit to the Regional Administrator an annual report assessing the cumulative impacts of the State's permit program on the integrity of State regulated waters. This report shall include:

(1) The number and nature of individual permits issued by the State during the year. This should include the locations and types of water bodies where permitted activities are sited (for example, wetlands, rivers, lakes, and other categories which the Director and Regional Administrator may establish);

(2) The number of acres of each of the categories of waters in paragraph (d)(1) of this section which were filled or which received any discharge or dredged material during the year (either by authorized or known unauthorized activities);

(3) The number and nature of permit applications denied; and permits modified, revoked and reissued, or terminated during the year.

(4) The number and nature of permits issued under emergency conditions, as provided in § 123.96;

(5) The approximate number of persons in the State discharging dredged or fill material under general permits and an estimate of the cumulative impacts of these activities.

(e) *Schedule.*

(1) *For all quarterly reports.* On the last working day of May, August, November, and February, the State Director shall submit to the Regional Administrator information concerning noncompliance with RCRA, UIC, NPDES, and State 404 permit requirements by major dischargers (or for 404, other dischargers specified under § 123.6(f)(1)(i)(A)–(E)) in the State in accordance with the following schedule. The Regional Administrator shall prepare and submit information for EPA-issued permits to EPA Headquarters in accordance with the same schedule:

Quarters Covered by Reports on Noncompliance by Major Dischargers

[Date for completion of reports]

January, February, and March	May 31 [1]
April, May, and June	Aug 31 [1]
July, August, and September	Nov. 30 [1]
October, November, and December	Feb 28 [1]

[1] Reports must be made available to the public for inspection and copying on this date.

(2) *For all annual reports.* The period for annual reports shall be for the calendar year ending December 31, with reports completed and available to the public no more than 60 days later.

§ 122.19 Confidentiality of information.

(a) In accordance with 40 CFR Part 2, any information submitted to EPA pursuant to these regulations may be claimed as confidential by the submitter. Any such claim must be asserted at the time of submission in the manner prescribed on the application form or instructions or, in the case of other submissions, by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2 (Public Information).

(b) *(Applicable to State programs, see § 123.7.)* Claims of confidentiality for the following information will be denied:

(1) The name and address of any permit applicant or permittee;

(2) *For UIC permits,* information which deals with the existence, absence, or level of contaminants in drinking water;

(3) *For NPDES permits,* permit applications and permits; and

(4) *For NPDES and 404 permits,* effluent data.

(c) *(Applicable to State programs, see § 123.7.) For NPDES only,* information required by NPDES application forms provided by the Director under §§ 122.4 and 122.53 may not be claimed confidential. This includes information submitted on the forms themselves and any attachments used to supply information required by the forms.

(d) *(Applicable to State programs, see § 122.7.) For RCRA only,*

(1) Claims or confidentiality for permit application information must be substantiated at the time the application is submitted and in the manner prescribed in the application instructions.

(2) If a submitter does not provide substantiation, the Director will notify it by certified mail of the requirement to do so. If the Director does not receive the substantiation within 10 days after the submitter receives the notice, the Director shall place the unsubstantiated information in the public file.

Subpart B—Additional Requirements for Hazardous Waste Programs Under the Resource Conservation and Recovery Act

§ 122.21 Purpose and scope of Subpart B.

(a) *Content of Subpart B.* The regulations in this Subpart set forth the specific requirements for the RCRA permit program. They apply to EPA, and to approved States to the extent set forth in Part 123. Sections of this Subpart which are applicable to States are indicated at the section headings as follows: (Applicable to State RCRA programs, see § 123.7). The regulations in this Subpart supplement the requirements in Part 122, Subpart A, which contains requirements for all programs.

(b) *Authority for this Subpart and other RCRA Subtitle C Regulations.*

(1) Section 3001 of RCRA requires EPA (i) to establish criteria for identifying the characteristics of hazardous waste and for listing hazardous waste, and (ii) using those criteria to identify the characteristics of hazardous waste and list particular wastes considered to be hazardous.

(2) Section 3002 of RCRA requires EPA to establish standards applicable to generators of hazardous waste. Section 3002 also requires establishment of a manifest system to assure that hazardous waste which is transported off-site goes to a permitted treatment, storage, or disposal facility.

(3) Section 3003 of RCRA requires EPA to establish standards applicable to transporters of hazardous waste.

(4) Section 3004 of RCRA requires EPA to establish standards for the location, design, construction, monitoring, and operation of hazardous waste treatment, storage, and disposal facilities.

(5) Section 3005 of RCRA requires EPA to publish regulations requiring each person owning or operating a hazardous waste treatment, storage, or disposal facility to obtain a RCRA permit.

(6) Section 3006 of RCRA requires EPA to publish guidelines to assist States in developing hazardous waste management programs.

(7) Section 3010 of RCRA requires any person who generates or transports hazardous waste, or who owns or operates a facility for the treatment, storage, or disposal of hazardous waste, to notify EPA (or States having approved hazardous waste programs under section 3006 of RCRA) of such activity within 90 days of the promulgation or revision of regulations under section 3001 of RCRA. Section 3010 provides that no hazardous waste subject to regulations under Subtitle C of RCRA may be transported, treated, stored, or disposed of unless the required notification has been given.

(8) The following chart indicates where the regulations for sections 3001 through 3006 and the public notice for section 3010 appear in the **Federal Register.**

Section of RCRA	Coverage	Final regulation	Location
Subtitle C	Overview and definitions	40 CFR Part 260	45 FR 12724, Feb. 26, 1980; and [45 FR ——].
3001	Identification and listing of hazardous waste.	40 CFR Part 261	[— FR —]
3002	Generators of hazardous waste.	40 CFR Part 262	45 FR 12724, Feb. 26, 1980.
3003	Transporters of hazardous waste.	40 CFR Part 263	45 FR 12737, Feb. 26, 1980.
3004	Standards for HWM facilities	40 CFR Parts 264, 265, and 266.	[— FR —]
3005	Permit requirements for HWM facilities.	40 CFR Parts 122 and 124	These regulations.
3006	Guidelines for State programs.	40 CFR Part 123	These regulations
3010	Preliminary notification of HW activity.	(Public Notice)	45 FR 12746, Feb. 26, 1980.

(c) *Overview of the RCRA Permit Program.* Not later than 90 days after the promulgation or revision of regulations in 40 CFR Part 261 (identifying and listing hazardous wastes) all generators and transporters of hazardous waste, and all owners or operators of hazardous waste treatment, storage, or disposal facilities must file a notification of that activity under section 3010. Six months after the initial promulgation of the Part 261 regulations, treatment, storage, or disposal of hazardous waste by any person who has not applied for or received a RCRA permit is prohibited. A RCRA permit application consists of two parts, Part A (see § 122.24) and Part B (see § 122.25). For "existing HWM facilities," the requirement to submit an application is satisfied by submitting only Part A of the permit application until the date the Director sets for submitting Part B of the application. (Part A consists of Forms 1 and 3 of the Consolidated Permit Application Forms.) Timely submission of both notification under section 3010 and Part A qualifies owners and operators of existing HWM facilities for *interim status* under section 3005(e) of RCRA. Facility owners and operators with interim status are treated as having been issued a permit until EPA or a State with interim authorization for Phase II or final authorization under Part 123 makes a final determination on the permit application. Facility owners and operators with interim status must comply with *interim status standards* set forth at 40 CFR Part 265 or with the equivalent provisions of a State program which has received interim or final authorization under Part 123. Facility owners and operators with interim status are not relieved from complying with other State requirements. For existing HWM facilities the Director shall set a date, giving at least six months notice, for submission of Part B of the application. There is no form for Part B of the application; rather, Part B must be submitted in narrative form and contain the information set forth at § 122.25. Owners or operators of new HWM facilities must submit Part A and Part B of the permit application at least 180 days before physical construction is expected to commence.

(d) *Scope of the RCRA permit requirement.* RCRA requires a permit for the "treatment," "storage," or "disposal" of any "hazardous waste" as identified or listed in 40 CFR Part 261. The terms "treatment," "storage," "disposal," and "hazardous waste" are defined in § 122.3.

(1) *Specific inclusions (applicable to State RCRA programs, see § 123.7).* Owners and operators of certain facilities require RCRA permits as well as permits under other programs for certain aspects of the facility operation. RCRA permits are required for:

(i) Injection wells that dispose of hazardous waste, and associated surface facilities that treat, store, or dispose of hazardous waste. (See § 122.30.) However, the owner and operator with a UIC permit in a State with an approved or promulgated UIC program, will be deemed to have a RCRA permit for the injection well itself if they comply with the requirements of § 122.26(b) (permit by rule for injection wells).

(ii) Treatment, storage, or disposal of hazardous waste at facilities requiring an NPDES permit. However, the owner and operator of a publicly owned treatment works receiving hazardous waste will be deemed to have a RCRA permit for that waste if they comply with the requirements of § 122.26(c) (permit by rule for POTWs).

(iii) Barges or vessels that dispose of hazardous waste by ocean disposal and onshore hazardous waste treatment or storage facilities associated with an ocean disposal operation. However, the owner and operator will be deemed to have a RCRA permit for ocean disposal from the barge or vessel itself if they comply with the requirements of § 122.26(a) (permit by rule for ocean disposal barges and vessels).

(2) *Specific exclusions.* The following persons are among those who are not required to obtain a RCRA permit:

(i) Generators who accumulate hazardous waste on-site for less than 90 days, as provided in 40 CFR § 262.34.

(ii) Farmers who dispose of hazardous waste pesticides from their own use as provided in 40 CFR § 262.51.

(iii) Persons who own or operate facilities solely for the treatment, storage, or disposal of hazardous waste excluded from regulations under this Part by 40 CFR § 261.4 or § 261.5 (small generator exemption).

(iv) Owners or operators of totally enclosed treatment facilities as defined in 40 CFR § 260.10.

(v) Owners or operators of totally enclosed treatment facilities as defined in 40 CFR § 260.10.

§ 122.22 Application for a permit.

(Applicable to State RCRA programs, see § 123.7.)

(a) *Existing HWM facilities.* (1) Not later than six months after the first promulgation of regulations in 40 CFR Part 261 listing and identifying hazardous wastes, all owners and operators of existing hazardous waste treatment, storage, or disposal facilities must submit Part A of their permit application with the Regional Administrator.

(2) At any time after promulgation of Phase II the owner and operator of an existing HWM facility may be required to submit Part B of their permit application. The State Director may require submission of Part B (or equivalent completion of the State RCRA application process) if the State in which the facility is located has received interim authorization for Phase II or final authorization; if not, the Regional Administrator may require submission of Part B. Any owner or operator shall be allowed at least six months from the date of request to submit Part B of the application. Any owner or operator of an existing HWM facility may voluntarily submit Part B of the application at any time.

(3) Failure to furnish a requested Part B application on time, or to furnish in full the information required by the Part B application, is grounds for termination of interim status under Part 124.

(b) *New HWM Facilities.* (1) No person shall begin physical construction on a new HWM facility without having submitted Part A and Part B of its permit application and received a finally effective RCRA permit.

(2) An application for a permit for a new HWM facility (including both Part A and Part B) may be filed any time after promulgation of Phase II. The application shall be filed with the Regional Administrator if at the time of application the State in which the new HWM facility is proposed to be located has not received interim authorization for Phase II or final authorization; otherwise it shall be filed with the State Director. All applications must be submitted at least 180 days before physical construction is expected to commence.

(c) *Updating permit applications.* (1) If any owner or operator of a HWM facility has filed Part A of a permit application and has not yet filed Part B, the owner or operator shall file an amended Part A application:

(i) With the Regional Administrator, if the facility is located in a State which has not obtained interim authorization for Phase II or final authorization, within six months after the promulgation of revised regulations under Part 261 listing or identifying additional hazardous wastes, if the facility is treating, storing, or disposing of any of those newly listed or identified wastes.

[Note.—EPA intends to promulgate regulations in June of 1980 listing or designating additional wastes beyond those listed or designated in its initial promulgation of Part 261. The wastes to be listed or designated in June are set forth in an Appendix to the initial promulgation. EPA encourages facilities applying for interim status before that second set of wastes is actually published to list or designate any of the wastes in that set which they are treating, storing, or disposing of. That will avoid the need to extensively update the Part A application when the June 1980 promulgation occurs.]

(ii) With the State Director, if the facility is located in a State which has obtained Phase II interim authorization or final authorization, no later than the effective date of regulatory provisions listing or designating wastes as hazardous in that State in addition to those listed or designated under the previously approved State program, if the facility is treating, storing, or disposing of any of those newly listed or designated wastes; or

(iii) As necessary to comply with provisions of § 122.23 for changes during interim status or the analogous provisions of a State program approved for final authorization or interim authorizaton for Phase II. Revised Part A applications necessary to comply with the provisions of § 122.23 shall be filed with the Regional Administrator if the State in which the facility in question is located does not have Phase II interim authorization or final authorization; otherwise it shall be filed with the State Director.

(2) The owner or operator of a facility who fails to comply with the updating requirements of paragraph (c)(1) of this section does not receive interim status as to the wastes not covered by duly filed Part A applications.

(d) *Reapplications.* Any HWM facility with an effective permit shall submit a new application at least 180 days before the expiration date of the effective permit, unless permission for a later date has been granted by the Director. (The Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.)

§ 122.23 Interim status.

(a) *Qualifying for interim status.* Any person who owns or operates an "existing HWM facility" shall have interim status and shall be treated as having been issued a permit to the extent he or she has:

(1) Notified the Administrator within 90 days from the promulgation or revision of Part 261 as required in Section 3010 of RCRA (this may be done by completing EPA form 8700-12); and

(2) Complied with the requirements of § 122.22 (a) and (c) governing submission of Part A applications;

(3) When EPA determines on examination or reexamination of a Part A application that it fails to meet the standards of these regulations, it may notify the owner or operator that the application is deficient and that the owner or operator is therefore not entitled to interim status. The owner or operator will then be subject to EPA enforcement for operating without a permit.

(b) *Coverage.* During the interim status period the facility shall not:

(1) Treat, store, or dispose of hazardous waste not specified in Part A of the permit application;

(2) Employ processes not specified in Part A of the permit application; or

(3) Exceed the design capacities specified in Part A of the permit application.

(c) *Changes during interim status.* (1) New hazardous wastes not previously identified in Part A of the permit application may be treated, stored, or disposed of at a facility if the owner or operator submits a revised Part A permit application prior to such a change;

(2) Increases in the design capacity of processes used at a facility may be made if the owner or operator submits a revised Part A permit application prior to such a change (along with a justification explaining the need for the change) and the Director approves the change because of a lack of available treatment, storage, or disposal capacity at other hazardous waste management facilities;

(3) Changes in the processes for the treatment, storage, or disposal of hazardous waste may be made at a facility or additional processes may be added if the owner or operator submits a revised Part A permit application prior to such a change (along with a justification explaining the need for the change) and the Director approves the change because:

(i) It is necessary to prevent a threat to human health or the environment because of an emergency situation, or

(ii) It is necessary to comply with Federal regulations (including the interim status standards at 40 CFR Part 265) or State or local laws.

(4) Changes in the ownership or operational control of a facility may be made if the new owner or operator submits a revised Part A permit application no later than 90 days prior to the scheduled change. When a transfer of ownership or operational control of a facility occurs, the old owner or operator shall comply with the requirements of 40 CFR Part 265, Subpart H (financial requirements), until the new owner or operator has demonstrated to the Director that it is complying with that Subpart. All other interim status duties are transferred effective immediately upon the date of the change of ownership or operational control of the facility. Upon demonstration to the Director by the new owner or operator of compliance with that Subpart, the Director shall notify the old owner or operator in writing that it no longer needs to comply with that Part as of the date of demonstration.

(5) In no event shall changes be made to an HWM facility during interim status which amount to reconstruction of the facility. Reconstruction occurs when the capital investment in the changes to the facility exceeds fifty percent of the capital cost of a comparable entirely new HWM facility.

(d) *Interim status standards.* During interim status, owners or operators shall comply with the interim status standards at 40 CFR Part 265.

(e) *Grounds for termination of interim status.* Interim status terminates when:

(1) Final administrative disposition of a permit application is made; or

(2) Interim status is terminated as provided in § 122.22(a)(3).

§ 122.24 Contents of Part A.

(Applicable to State RCRA programs, see § 123.7.)

In addition to the information in § 122.4(d), Part A of the RCRA application shall include the following information:

(a) The latitude and longitude of the facility.

(b) The name, address, and telephone number of the owner of the facility.

(c) An indication of whether the facility is new or existing and whether it is a first or revised application.

(d) For existing facilities, a scale drawing of the facility showing the location of all past, present, and future treatment, storage, and disposal areas.

(e) For existing facilities, photographs of the facility clearly delineating all existing structures; existing treatment, storage, and disposal areas; and sites of future treatment, storage, and disposal areas.

(f) A description of the processes to be used for treating, storing, and disposing of hazardous waste, and the design capacity of these items.

(g) A specification of the hazardous wastes listed or designated under 40 CFR Part 261 to be treated, stored, or disposed at the facility, an estimate of the quantity of such wastes to be treated, stored, or disposed annually, and a general description of the processes to be used for such wastes.

§ 122.25 Contents of Part B.

(Applicable to State RCRA programs, see § 123.7.)

Part B of the RCRA application includes the following:

(a) *General information requirements.* The following information is required for all facilities:

(1) A general description of the facility.

(2) Chemical and physical analyses of the hazardous wastes to be handled at the facility. At a minimum, these analyses shall contain all the information which must be known to treat, store, or dispose of the wastes in accordance with Part 264.

(3) A copy of the waste analysis plan required by § 264.13(b) and, if applicable, § 264.13(c).

(4) A description of the security procedures and equipment required by § 264.14, or a justification demonstrating the reasons for requesting a waiver of this requirement.

(5) A copy of the general inspection schedule required by § 264.15(b).

(6) A justification of any request for a waiver(s) of the preparedness and prevention requirements of § 264.30.

(7) A copy of the contingency plan required by Part 264, Subpart D.

(8) A description of procedures, structures, or equipment used at the facility to,

(i) Prevent uncontrolled reaction of incompatible wastes (for example, procedures to avoid fires, explosions, or toxic gases).

(ii) Prevent hazards in unloading operations (for example, ramps, special forklifts).

(iii) Prevent runoff from hazardous waste handling areas to other areas of the facility or environment, or to prevent flooding (for example, berms, dikes, trenches).

(iv) Prevent contamination of water supplies.

(v) Mitigate effects of equipment failure and power outages.

(vi) Prevent undue exposure of personnel to hazardous waste (for example, protective clothing).

(9) Traffic pattern, volume and control (for example, show turns across traffic lanes, and stacking lanes (if appropriate); provide access road surfacing and load bearing capacity; show traffic control signals; provide estimates of traffic volume (number, types of vehicles)).

b. [*Reserved.*]

[Note.—The requirements set forth in § 122.25(a) reflect those permit application requirements related to the initial promulgation of Part 264. Additional permit application requirements including specific design and operating data, financial plans, and site engineering information will be promulgated when the remaining portions of Part 264 are promulgated.]

§ 122.26 Permits by rule.

(Applicable to State RCRA programs, see § 123.7.)

Notwithstanding any other provision of this Part or Part 124, the following shall be deemed to have a RCRA permit if the conditions listed are met:

(a) *Ocean disposal barges or vessels.* The owner or operator of a barge or other vessel which accepts hazardous waste for ocean disposal, if the owner or operator:

(1) Has a permit for ocean dumping issued under 40 CFR Part 220 (Ocean Dumping, authorized by the Marine Protection, Research, and Sanctuaries Act, as amended, 33 U.S.C. § 1420 *et seq.*);

(2) Complies with the conditions of that permit; and

(3) Complies with the following hazardous waste regulations:

(i) 40 CFR § 264.11, Identification number;

(ii) 40 CFR § 264.71, Use of manifest system;

(iii) 40 CFR § 264.72, Manifest discrepancies;

(iv) 40 CFR § 264.73(a) and (b)(1), Operating record;

(v) 40 CFR § 264.75, Annual report; and

(vi) 40 CFR § 264.76, Unmanifested waste report.

(b) *Injection wells.* The owner or operator of an injection well disposing of hazardous waste, if the owner or operator:

(1) Has a permit for underground injection issued under Part 122, Subpart C or Part 123, Subpart C; and

(2) Complies with the conditions of that permit and the requirements of § 122.45 (requirements for wells managing hazardous waste).

(c) *Publicly owned treatment works.* The owner or operator of a POTW which accepts for treatment hazardous waste, if the owner or operator:

(1) Has an NPDES permit;

(2) Complies with the conditions of that permit; and

(3) Complies with the following regulations:

(i) 40 CFR § 264.11, Identification number;

(ii) 40 CFR § 264.71, Use of manifest system;

(iii) 40 CFR § 264.72, Manifest discrepancies;

(iv) 40 CFR § 264.73 (a) and (b)(1), Operating record;

(v) 40 CFR § 264.75, Annual report;

(vi) 40 CFR § 264.76, Unmanifested waste report; and

(4) If the waste meets all Federal, State, and local pretreatment requirements which would be applicable to the waste if it were being discharged into the POTW through a sewer, pipe, or similar conveyance.

§ 122.27 Emergency permits.

(Applicable to State RCRA programs, see § 123.7.)

Notwithstanding any other provision of this Part or Part 124, in the event the Director finds an imminent and substantial endangerment to human health or the environment the Director may issue a temporary emergency permit to a facility to allow treatment, storage, or disposal of hazardous waste for a non-permitted facility or not covered by the permit for a facility with an effective permit. This emergency permit:

(a) May be oral or written. If oral, it shall be followed within five days by a written emergency permit;

(b) Shall not exceed 90 days in duration;

(c) Shall clearly specify the hazardous wastes to be received, and the manner and location of their treatment, storage, or disposal;

(d) May be terminated by the Director at any time without process if he or she determines that termination is appropriate to protect human health and the environment;

(e) Shall be accompanied by a public notice published under § 124.11(b) including:

(1) Name and address of the office granting the emergency authorization;

(2) Name and location of the permitted HWM facility;

(3) A brief description of the wastes involved;

(4) A brief description of the action authorized and reasons for authorizing it; and

(5) Duration of the emergency permit; and

(f) Shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of this Part and 40 CFR Parts 264 and 266.

§ 122.28 Additional conditions applicable to all RCRA permits.

(Applicable to State RCRA programs, see § 122.7.)

The following conditions, in addition to those set forth in § 122.7, apply to all RCRA permits:

(a) In addition to § 122.7(a) (duty to comply): the permittee need not comply with the conditions of this permit to the extent and for the duration such noncompliance is authorized in an emergency permit. (See § 122.27.)

(b) In addition to § 122.7(j) (monitoring): the permittee shall maintain records from all ground monitoring wells and associated groundwater surface elevations, for the active life of the facility, and for disposal facilities for the post-closure care period as well.

(c) In addition to § 122.7(l)(1) (notice of planned changes): for a new HWM facility, the permittee may not commence treatment, storage, or disposal of hazardous waste; and for a facility being modified the permittee may not treat, store, or dispose of hazardous waste in the modified portion of the facility, until:

(1) The permittee has submitted to the Director by certified mail or hand delivery a letter signed by the permittee and a registered professional engineer stating that the facility has been constructed or modified in compliance with the permit; and

(2)(i) The Director has inspected the modified or newly constructed facility and finds it is in compliance with the conditions of the permit; or

(ii) Within 15 days of the date of submission of the letter in paragraph (c)(1) of this section, the permittee has not received notice from the Director of his or her intent to inspect, prior inspection is waived and the permittee may commence treatment, storage, or disposal of hazardous waste.

(d) The following shall be included as information which must be reported orally within 24 hours under § 122.7(l)(6):

(1) Information concerning release of any hazardous waste that may cause an

endangerment to public drinking water supplies.

(2) Any information of a release or discharge of hazardous waste, or of a fire or explosion from a HWM facility, which could threaten the environment or human health outside the facility. The description of the occurrence and its cause shall include:

(i) Name, address, and telephone number of the owner or operator;

(ii) Name, address, and telephone number of the facility;

(iii) Date, time, and type of incident;

(iv) Name and quantity of material(s) involved;

(v) The extent of injuries, if any;

(vi) An assessment of actual or potential hazards to the environment and human health outside the facility, where this is applicable; and

(vii) Estimated quantity and disposition of recovered material that resulted from the incident.

The Director may waive the five day written notice requirement in favor of a written report within fifteen days.

(e) The following reports required by Part 264 shall be submitted in addition to those required by § 122.7(l) (reporting requirements):

(1) Manifest discrepancy report: if a significant discrepancy in a manifest is discovered, the permittee must attempt to reconcile the discrepancy. If not resolved within fifteen days, the permittee must submit a letter report including a copy of the manifest to the Director. (See 40 CFR § 264.72.)

(2) Unmanifested waste report: must be submitted to the Director within 15 days of receipt of unmanifested waste. (See § 264.76.)

(3) Annual report: an annual report must be submitted covering facility activities during the previous calendar year. (See 40 CFR § 264.75.)

(4) [Reserved.]

[Note.—The above reports are required in Part 264 as initially promulgated. Additional reports will be required and added to this section when remaining portions of Part 264 are promulgated.]

§ 122.29 Establishing RCRA permit conditions.

(Applicable to State RCRA programs, see § 123.7.)

In addition to the conditions established under § 122.8(a), each RCRA permit shall include each of the applicable requirements specified in 40 CFR Parts 264 and 266.

§ 122.30 Interim permits for UIC wells.

(Applicable to State programs, see § 123.7.)

The Director may issue a permit under this Part to any Class I UIC well (see § 122.32) injecting hazardous wastes within a State in which no UIC program has been approved or promulgated. Any such permit shall apply and insure compliance with all applicable requirements of 40 CFR Part 264, Subpart R (RCRA standards for wells), and shall be for a term not to exceed two years. No such permit shall be issued after approval or promulgation of a UIC program in the State. Any permit under this section shall contain a condition providing that it will terminate upon final action by the Director under a UIC program to issue or deny a UIC permit for the facility.

Subpart C—Additional Requirements for UIC Programs Under the Safe Drinking Water Act

§ 122.31 Purpose and scope of Subpart C.

(a) *Content of Subpart C.* The regulations in this Subpart set forth the specific requirements for the UIC program. They apply to EPA, and to approved States to the extent set forth in Part 123. Sections of this Subpart which are applicable to States are indicated at the section heading as follows: (Applicable to State UIC programs, see § 123.7). The regulations in this Subpart are supplemental to the requirements in Part 122, Subpart A, which contains requirements for all programs.

(b) *Authority.* (1) Section 1421 of SDWA requires the Administrator to promulgate regulations establishing minimum requirements for effective UIC programs.

(2) Section 1422 of SDWA requires the Administrator to list in the Federal Register "each State for which in his judgment a State underground injection control program may be necessary to assure that underground injection will not endanger drinking water sources" and to establish by regulation a program for EPA administration of UIC programs in the absence of an approved State program in a listed State.

(3) Section 1423 of SDWA provides procedures for EPA enforcement of UIC requirements where the State fails to enforce those requirements.

(4) Section 1431 authorizes the Administrator to take action to protect the health of persons when a contaminant which is present in or may enter a public water system may present an imminent and substantial endangerment to the health of persons.

(5) Section 1445 of SDWA authorizes the promulgation of regulations for such recordkeeping, reporting, and monitoring requirements "as the Administrator may reasonably require . . . to assist him in establishing regulations under this title," and a "right of entry and inspection to determine compliance with this title, including for this purpose, inspection, at reasonable times, of records, files, papers, processes, controls, and facilities . . . ."

(6) Section 1450 of SDWA authorizes the Administrator "to prescribe such regulations as are necessary or appropriate to carry out his functions" under SDWA.

(c) *Overview of the UIC program.* A UIC program is necessary in any State listed by EPA under section 1422 of SDWA. Because all States have been listed, all States must submit a UIC program within 270 days after the effective date of these rules and 40 CFR Part 146, unless the Administrator grants an extension, which can be for a period not to exceed an additional 270 days. If a State fails to submit an approvable program, EPA will establish a program for that State. Once a program is established, SDWA provides that all underground injections in listed States are unlawful and subject to penalties unless authorized by a permit or a rule. This Subpart sets forth the requirements governing authorizations by permit or rule and prohibits authorization of certain types of injection. The technical regulations governing these authorizations appear in 40 CFR Part 146.

(d) *Scope of the permit or rule requirement.* The UIC permit program regulates underground injections by five classes of wells (see definition of "well injection," § 122.3). The five classes of wells are set forth in § 122.32. All owners or operators of these injection wells must be authorized either by permit or rule by the Director. In carrying out the mandate of the SDWA, this Subpart provides that no Class I, II, or III well shall be authorized by permit or rule if it results in movement of fluid into underground sources of drinking water (USDWs) (§ 122.34). The technical requirements of Part 146 are designed to insure that such movement will not occur. No Class V well shall be authorized by permit or rule if it results in the presence of any contaminant in USDWs which may adversely affect the health of persons (§ 122.34). Existing Class IV wells which inject hazardous waste directly into an underground source of drinking water are to be eliminated over a period of six months and new such Class IV wells are to be prohibited (§ 122.36). Class V wells will be inventoried and assessed and regulatory action will be established at a later date. In the meantime, if remedial action appears necessary, an individual permit may be required (§ 122.37) or the

Director must require remedial action or closure by order (§ 122.34(c)). During UIC program development, the Director may identify aquifers and portions of aquifers which are actual or potential sources of drinking water (see § 123.4(g) for State programs). This will provide an aid to the Director in carrying out his or her duty to protect all USDWs. An aquifer is a USDW if it fits the definition, even if it has not been "identified." The Director may also designate "exempted aquifers" using criteria in Part 146. Such aquifers are those which would otherwise qualify as "underground sources of drinking water" to be protected, but which have no real potential to be used as drinking water sources. Therefore they are not USDWs. No aquifer is an "exempted aquifer" until it has been affirmatively designated under the procedures in § 122.35. Aquifers which do not fit the definition of "underground sources of drinking water" are not "exempted aquifers." They are simply not subject to the special protection afforded USDWs.

(1) *Specific inclusions.* The following wells are included among those types of injection activities which are covered by the UIC regulations. (This list is not intended to be exclusive but is for clarification only.)

(i) Any injection well located on a drilling platform inside a State's territorial waters.

(ii) Any dug hole or well that is deeper than its largest surface dimension, where the principal function of the hole is emplacement of fluids.

(iii) Any septic tank or cesspool used by generators of hazardous waste, or by owners or operators of hazardous waste management facilities, to dispose of fluids containing hazardous waste.

(iv) Any septic tank, cesspool, or other well used by a multiple dwelling, community, or Regional system for the injection of wastes.

(2) *Specific exclusions.* The following are not covered by these regulations:

(i) Injection wells located on a drilling platform or other site that is beyond a State's territorial waters.

(ii) Individual or single family residential waste disposal systems such as domestic cesspools or septic systems.

(iii) Any dug hole which is not used for emplacement of fluids underground.

§ 122.32 Classification of injection wells.

(Applicable to State UIC programs, see § 123.7.)

Injection wells are classified as follows:

(a) *Class I.*

(1) Wells used by generators of hazardous wastes or owners or operators of hazardous waste management facilities to inject hazardous waste, other than Class IV wells.

(2) Other industrial and municipal disposal wells which inject fluids beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water.

(b) *Class II.* Wells which inject fluids:

(1) Which are brought to the surface in connection with conventional oil or natural gas production;

(2) For enhanced recovery of oil or natural gas; and

(3) For storage of hydrocarbons which are liquid at standard temperature and pressure.

(c) *Class III.* Wells which inject for extraction of minerals or energy, including:

(1) Mining of sulfur by the Frasch process;

(2) Solution mining of minerals;

(3) In situ combustion of fossil fuel; and

(4) Recovery of geothermal energy.

(d) *Class IV.* Wells used by generators of hazardous wastes or of radioactive wastes, by owners or operators of hazardous waste management facilities, or by owners or operators of radioactive waste disposal sites to dispose of hazardous wastes or radioactive wastes into or above a formation which within one quarter mile of the well contains an underground source of drinking water.

(e) *Class V.* Injection wells not included in Classes I, II, III, or IV.

§ 122.33 Prohibition of unauthorized injection.

(Applicable to State programs, see § 123.7.)

Any UIC program shall prohibit, effective no later than the date of approval (for State programs) or the effective date of regulations establishing the program (for EPA-administered programs) any underground injection, except as authorized by permit or rule issued under this Part and Part 123, as applicable. Any UIC program shall also prohibit the construction of any well required to have a permit under this Part until the permit has been issued.

§ 122.34 Prohibition of movement of fluid into underground sources of drinking water.

(Applicable to State UIC programs, see § 123.7.)

(a) No UIC authorization by permit or rule shall be allowed in the following circumstances:

(1) Where a Class I, II, or III well causes or allows movement of fluid into underground sources of drinking water.

(2) Where a Class IV or V well causes or allows movement of fluid containing any contaminant into underground sources of drinking water, and the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR Part 142 or which may adversely affect the health of persons.

(b) For Class, I, II, and III wells, if any monitoring indicates the movement of injection or formation fluids into underground sources of drinking water, the Director shall prescribe such additional requirements for construction, corrective action, operation, monitoring, or reporting (including closure of the injection well) as are necessary to prevent such movement. In the case of wells authorized by permit, these additional requirements shall be imposed by modifying the permit in accordance with § 122.15, or the permit may be terminated under § 122.16 if cause exists, or appropriate enforcement action may be taken if the permit has been violated. In the case of wells authorized by rule, see § 122.37(a).

(c) For Class V wells, if at any time the Director learns that a Class V well may cause a violation of primary drinking water regulations under 40 CFR Part 142, he or she shall:

(1) Require the injector to obtain an individual permit;

(2) Order the injector to take such actions (including where required closure of the injection well) as may be necessary to prevent the violation; or

(3) Take enforcement action.

(d) Whenever the Director learns that a Class V well may be otherwise adversely affecting the health of persons, he or she may prescribe such actions as may be necessary to prevent the adverse effect, including any action authorized under paragraph (c) of this section.

(e) Notwithstanding any other provision of this section, the Director may take emergency action upon receipt of information that a contaminant which is present in or is likely to enter a public water system may present an imminent and substantial endangerment to the health of persons.

§ 122.35 Identification of underground sources of drinking water and exempted aquifers.

(Applicable to State UIC programs, see § 123.7.)

(a) The Director may identify (by narrative description, illustrations, maps, or other means) and shall protect, except where exempted under paragraph (b) of this section, as an underground source of drinking water, all aquifers or parts of aquifers which meet the definition of an "underground source of drinking water" in § 122.3. Even if an aquifer has not been specifically identified by the Director, it is an underground source of drinking water if it meets the definition in § 122.3.

(b) After notice and opportunity for a public hearing the Director may identify (by narrative description, illustrations, maps, or other means) and describe in geographic and/or geometric terms (such as vertical and lateral limits and gradient) which are clear and definite, all aquifers or parts thereof which the Director proposes to designate as exempted aquifers using the criteria in 40 CFR § 146.04. For State UIC programs, no such designation shall be final until approved by the Administrator as part of the State program. Subsequent to program approval identification of additional exempted aquifers shall be treated as program modifications under § 123.6(b)(8).

§ 122.36 Elimination of certain Class IV wells.

(Applicable to State UIC programs, see § 123.7.)

(a) In addition to the requirement of § 122.45, any UIC program shall prohibit:

(1) The construction of any Class IV well for the injection of hazardous waste directly into an underground source of drinking water;

(2) The injection of hazardous waste directly into an underground source of drinking water through a Class IV well that was not in operation prior to the effective date of this Part;

(3) Any increase in the amount of hazardous waste or change in the type of hazardous waste injected into a well injecting hazardous waste directly into a USDW.

(4) The operation of any Class IV well injecting hazardous waste directly into a USDW after 6 months following approval or promulgation of any UIC program for a State.

§ 122.37 Authorization of underground injection by rule.

(Applicable to State UIC programs, see § 123.7.)

(a) *Types of underground injection which may be authorized by rule.* The Director may authorize underground injections by rule as outlined in this paragraph. Underground injections not authorized by rule or by permit are prohibited (see § 122.33).

(1) Injection into existing Class I, II (except existing enhanced recovery and hydrocarbon storage), and III wells may be authorized by rule for periods up to five years from the date of approval or promulgation of the UIC program. (All wells must be issued permits within the five year period or close down at its end, unless the rule is continued under § 122.38(a).) The rule shall require compliance with applicable requirements of 40 CFR Part 146 as soon as possible but no later than one year after the authorization. Rules authorizing existing Class II and Class III facilities may allow them to continue normal operations until permitted, including construction and operation of new injection wells at the facility site, provided the owner or operator maintains compliance with all applicable requirements.

(2) Injection into existing Class II enhanced recovery and hydrocarbon storage wells may be authorized for the life of the well. The rule shall include compliance schedules for achieving applicable requirements of 40 CFR 146 no later than one year, and with the construction requirements of 40 CFR Part 146 no later than three years, after the promulgation of the rule.

(3) Injection into existing Class IV wells injecting directly into a USDW may be authorized for a period of not more than six months after approval or promulgation of the UIC program. The rule shall require monitoring and reporting as set forth in 40 CFR § 146.44 within 90 days of the authorization.

(4) Injections into Class V wells may be authorized indefinitely, subject to the requirement of paragraphs (b) and (d) of this section and 40 CFR § 146.53. However, the Director must have authority to withdraw the authorization if required under this Part.

(b) *Requirements of rules.* Any rule promulgated by the Director shall apply, and ensure compliance with, the following requirements applicable to permittees, except that the terms "permit" and "permittee" shall be read to include rules and those authorized by rule:

(1) § 122.41(a)—(exemption from rule where authorized by temporary permits);

(2) § 122.41(b)—(retention of records);

(3) § 122.41(d)—(reporting within 24 hours);

(4) § 122.41(e)—(180 days notice of abandonment);

(5) Construction requirements under § 146.12 (Class I), § 146.22 (Class II), and § 146.32 (Class III);

(6) For Class I, II, or III wells, corrective action under § 146.07;

(7) Operating, monitoring, and reporting requirements under § 146.13 (Class I), § 146.23 (Class II), and § 146.33 (Class III);

(8) § 122.42(g)—(Financial responsibility);

(9) Mechanical integrity requirements under § 146.08.

(c) *Requiring a permit.* (1) The Director may require any Class I, II, III, or V injection well authorized by a rule to apply for and obtain an individual or area UIC permit. Cases where individual or area UIC permits may be required include:

(i) The injection well is not in compliance with any requirement of the rule;

[Note.—Any underground injection which violates any rule under this section is subject to appropriate enforcement action.]

(ii) The injection well is not or no longer is within the category of wells and types of well operations authorized in the rule;

(iii) The protection of USDWs requires that the injection operation be regulated by requirements, such as for corrective action, monitoring and reporting, or operation, which are not contained in the rule.

(2) For EPA administered programs, the Regional Administrator may require the owner or operator authorized by a rule to apply for an individual or area UIC permit under this paragraph only if the owner or operator has been notified in writing that a permit application is required. The notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that upon the effective date of the UIC permit the rule no longer applies to the activities regulated under the UIC programs.

(3) Any owner or operator authorized by a rule may request to be excluded from the coverage of the rule by applying for an individual or area UIC permit. The owner or operator shall submit an application under § 122.38 with reasons supporting the request, to the Director. The Director may grant any such request.

(d) *Inventory requirements.* All injection wells covered by rule shall submit inventory information to the Director. Any rule under this section shall provide for the automatic termination of authorization for any well which fails to comply within the time specified in paragraph (c)(3) of this section.

(1) *Contents.* The Director shall require at least the information listed in § 146.52 as part of the inventory.

(2) *Notice.* Upon approval of the UIC program in a State, the Director shall notify owners or operators of injection wells of their duty to submit inventory information. The method of notification selected by the Director must assure that the owners or operators will be

made aware of the inventory requirement.

(3) *Deadlines.* Owners or operators of injection wells must submit inventory information no later than one year after the authorization by rule. The Director need not require inventory information from any facility with interim status under RCRA.

(e) *Assessment of Class V Wells.* The Director shall, within three years of the approval of the program in a State submit a report and recommendations to EPA in compliance with § 146.52(b).

§ 122.38 Application for a permit; authorization by permit.

(Applicable to State UIC programs, see § 123.7.)

(a) *Permit application.* Except as provided in § 122.37 (authorization by rule), all underground injections into Class I, II, or III wells in listed States shall be prohibited unless authorized by permit. Those authorized by a rule under § 122.37 must still apply for a permit under this section unless authorization by rule was for the life of the well. Rules authorizing well injections for which permit applications have been submitted shall lapse for a particular well injection only upon the effective date of the permit or permit denial for that well injection.

(b) *Time to apply.* Any person who performs or proposes an underground injection for which a permit is or will be required shall submit an application to the Director in accordance with the State UIC program as follows:

(1) For existing injection wells, as expeditiously as practicable and in accordance with the schedule contained in any program description under § 123.4(g), but no later than 4 years from the approval of the UIC program, or as required under § 122.45(b) for wells injecting hazardous waste.

(2) For new injection wells, except new wells covered by an existing area permit under § 122.39(c), a reasonable time before construction is expected to begin. (See also § 122.41(b)).

(c) *Contents of UIC application.* [Reserved.]

§ 122.39 Area permits.

(Applicable to State UIC programs, see § 123.7.)

(a) The Director may issue a permit on an area basis, rather than for each well individually, provided that the permit is for injection wells:

(1) Described and identified by location in permit application(s), if they are existing wells,

(2) Within the same well field, facility site, reservoir, project, or similar unit in the same State;

(3) Of similar construction;

(4) Of the same class as determined under § 122.32; and

(5) Operated by a single owner or operator.

(b) Area permits shall specify:

(1) The area within which underground injections are authorized, and

(2) The requirements for construction, monitoring, reporting, operation, and abandonment, for all wells authorized by the permit.

(c) The area permit may authorize the permittee to construct and operate new injection wells within the permit area provided:

(1) The permittee notifies the Director no later than the date on which monitoring reports are required to be submitted under § 122.7(l)(4), pursuant to a procedure which shall be specified in the permit, when and where the new well has been or will be drilled;

(2) The additional well satisfies the criteria in paragraph (a) of this section and meets the requirements specified in the permit under paragraph (b) of this section; and

(3) The cumulative effects of drilling and operation of additional injection wells are considered by the Director during evaluation of the area permit application and are acceptable to the Director.

(d) If the Director determines that any well constructed pursuant to paragraph (c) of this section does not satisfy any of the requirements of paragraphs (c)(1) and (c)(2) of this section the Director may modify the permit under § 122.15, terminate under § 122.16, or take enforcement action. If the Director determines that cumulative effects are unacceptable, the permit may be modified under § 122.15.

§ 122.40 Emergency permits.

(a) *Coverage.* Notwithstanding any other provision of this Part or Part 124, the Director may temporarily permit a specific underground injection which has not otherwise been authorized by rule or permit if:

(1) An imminent and substantial endangerment to the health of persons will result unless a temporary emergency permit is granted; or

(2) A substantial and irretrievable loss of oil or gas resources will occur unless a temporary emergency permit is granted to a Class II well; and

(i) Timely application for a permit could not practicably have been made; and

(ii) The injection will not result in the movement of fluids into undergound sources of drinking water; or

(3) A substantial delay in production of oil or gas resources will occur unless a temporary emergency permit is granted to a new Class II well and the temporary authorization will not result in the movement of fluids into an underground source of drinking water.

(b) *Requirements for issuance.* (1) Any temporary permit under paragraph (a)(1) of this section shall be for no longer term than required to prevent the hazard.

(2) Any temporary permit under paragraph (a)(2) of this section shall be for no longer than 90 days, except that if a permit application has been submitted prior to the expiration of the 90-day period, the Director may extend the temporary permit until final action on the application.

(3) Any temporary permit under paragraph (a)(3) of this section shall be issued only after a complete permit application has been submitted and shall be effective until final action on the application.

(4) Notice of any temporary permit under this paragraph shall be published in accordance with § 124.11 within 10 days of the issuance of the permit.

(5) The temporary permit under this section may be either oral or written. If oral, it must be followed within 5 calendar days by a written temporary emergency permit.

(6) The Director shall condition the temporary permit in any manner he or she determines is necessary to ensure that the injection will not result in the movement of fluids into an underground source of drinking water.

§ 122.41 Additional conditions applicable to all UIC permits.

(Applicable to State UIC programs, see § 123.7.)

The following conditions, in addition to those set forth in § 122.7, apply to all UIC permits and shall be incorporated into all permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or approved State regulations) must be given in the permit.

(a) In addition to § 122.7(a) (duty to comply): the permittee need not comply with the provisions of this permit to the extent and for the duration such noncompliance is authorized in a temporary emergency permit under § 122.40.

(b) In addition to § 122.7(j)(2) (monitoring and records): the permittee shall retain all records concerning the nature and composition of injected fluids until five years after completion of any plugging and abandonment procedures specified under § 122.42(f). The Director may require the owner or operator to deliver the records to the Director at the conclusion of the retention period.

(c) In addition to § 122.7(l)(1) (notice of planned changes): a new injection well may not commence injection until construction is complete, and

(1) The permittee has submitted notice of completion of construction to the Director; and

(2)(i) The Director has inspected or otherwise reviewed the new injection well and finds it is in compliance with the conditions of the permit; or

(ii) The permittee has not received notice from the Director of his or her intent to inspect or otherwise review the new injection well within 13 days of the date of the notice in paragraph (c)(1) of this section, in which case prior inspection or review is waived and the permittee may commence injection.

(d) The following shall be included as information which must be reported within 24 hours under § 122.7(l)(5):

(1) Any monitoring or other information which indicates that any contaminant may cause an endangerment to a USDW.

(2) Any noncompliance with a permit condition or malfunction of the injection system which may cause fluid migration into or between USDWs.

(e) The permittee shall notify the Director at least 180 days before conversion or abandonment of the well.

§ 122.42 Establishing UIC permit conditions.

(Applicable to State programs, see § 123.7.)

In addition to the conditions established under § 122.8(a), each UIC permit shall include conditions meeting the following requirements, when applicable:

(a) *Construction requirements* as set forth in Part 146. Existing wells shall achieve compliance with such requirements according to a compliance schedule established as a permit condition. The owner or operator of a proposed new injection well shall submit plans for testing, drilling, and construction as part of the permit application. Except as authorized by an area permit, no construction may commence until a permit has been issued containing construction requirements (see § 122.33). New wells shall be in compliance with these requirements prior to commencing injection operations. Changes in construction plans during construction may be approved by the Director as minor modifications (§ 122.17). No such changes may be physically incorporated into construction of the well prior to approval of the modification by the Director.

(b) *Corrective action* as set forth in § 122.44 and § 146.7.

(c) *Operation requirements* as set forth in 40 CFR Part 146; the permit shall establish any maximum injection volumes and/or pressures necessary to assure that fractures are not initiated in the confining zone, that injected fluids do not migrate into any underground source of drinking water, that formation fluids are not displaced into any underground source of drinking water, and to assure compliance with the Part 146 operating requirements.

(d) *Requirements for wells managing hazardous waste,* as set forth in § 122.45.

(e) *Monitoring and reporting requirements* as set forth in 40 CFR Part 146. The permittee shall be required to identify types of tests and methods used to generate the monitoring data.

(f) *Plugging and abandonment.* Any Class I, II or III permit shall include, and any Class V permit may include, conditions to ensure that plugging and abandonment of the well will not allow the movement of fluids either into an underground source of drinking water or from one underground source of drinking water to another. Any applicant for a UIC permit shall be required to submit a plan for plugging and abandonment. Where the plan meets the requirements of this paragraph, the Director shall incorporate it into the permit as a condition. Where the Director's review of an application indicates that the permittee's plan is inadequate, the Director shall require the applicant to revise the plan, prescribe conditions meeting the requirements of this paragraph, or deny the application. For purposes of this paragraph, temporary intermittent cessation of injection operations is not abandonment.

(g) *Financial responsibility.* The permit shall require the permittee to maintain financial responsibility and resources, in the form of performance bonds or other equivalent form of financial assurance approved by the Director, to close, plug, and abandon the underground injection operation in a manner prescribed by the Director. In lieu of individual performance bonds, operators may furnish a bond or other equivalent form of financial guarantee approved by the Director covering all injection wells in any one State.

(h) *Mechanical integrity.* A permit for any Class I, II, or III well or injection project which lacks mechanical integrity shall include, and for any Class V well may include, a condition prohibiting injection operations until the permittee shows to the satisfaction of the Director under § 146.08 that the well has mechanical integrity.

(i) *Additional conditions.* The Director shall impose on a case-by-case basis such additional conditions as are necessary to prevent the migration of fluids into underground sources of drinking water.

§ 122.43 Waiver of requirements by Director.

(a) *When injection does not occur into, through, or above an underground source of drinking water,* the Director may authorize a well with less stringent requirements for area of review, construction, mechanical integrity, operation, monitoring, and reporting than required in 40 CFR 146 or § 122.42 to the extent that the reduction in requirements will not result in an increased risk of movement of fluids into an underground source of drinking water.

(b) *When injection occurs into, through, or above an underground source of drinking water,* but the radius of endangering influence when computed under § 146.06(c) is a negative number, the Director may authorize a well with less stringent requirements for operation, monitoring, and reporting than required in 40 CFR 146 or § 122.42 to the extent that the reduction in requirements will not result in an increased risk of movement of fluids into an underground source of drinking water.

(c) When reducing requirements under paragraph (a) or (b) of this section, the Director shall prepare a fact sheet under § 124.9 (or equivalent document under State procedures) explaining the reasons for the action.

§ 122.44 Corrective action.

(Applicable to State UIC programs, see § 123.7.)

(a) *Coverage.* Applicants for Class I, II (other than existing), or III injection well permits shall identify the location of all known wells within the injection well's area of review which penetrate the injection zone. For such wells which are improperly sealed, completed, or abandoned, the applicant shall also submit a plan consisting of such steps or modifications as are necessary to prevent movement of fluid into underground sources of drinking water ("corrective action"). Where the plan is adequate, the Director shall incorporate it into the permit as a condition. Where the Director's review of an application indicates that the permittee's plan is inadequate (based on the factors in § 146.07) the Director shall require the applicant to revise the plan, prescribe a plan for corrective action as a condition of the permit under paragraph (b) of this section, or deny the application. The Director may disregard the provisions of § 146.06 (area of review) and § 146.07 (corrective action) when reviewing an application to permit an existing Class II well.

(b) *Requirements*—(1) *Existing injection wells.* Any permit issued for an existing injection well (other than Class II) requiring corrective action shall include a compliance schedule requiring any corrective action accepted or prescribed under paragraph (a) of this section to be completed as soon as possible.

(2) *New injection wells.* No permit for a new injection well may authorize injection until all required corrective action has been taken.

(3) *Injection pressure limitation.* The Director may require as a permit condition that injection pressure be so limited that pressure in the injection zone does not exceed hydrostatic pressure at the site of any improperly completed or abandoned well within the area of review. This pressure limitation shall satisfy the corrective action requirement. Alternatively, such injection pressure limitation can be part of a compliance schedule and last until all other required corrective action has been taken.

§ 122.45 Requirements for wells injecting hazardous waste.

(Applicable to State UIC programs, see § 123.7.)

(a) *Applicability.* The regulations in this section apply to all generators of hazardous waste, and to the owners or operators of all hazardous waste management facilities, using any class of well to inject hazardous wastes accompanied by a manifest. (See also § 122.36.)

(b) *Authorization.* The owner or operator of any well that is used to inject hazardous wastes accompanied by a manifest or delivery document shall apply for authorization to inject as specified in § 122.38 within 6 months after the approval of an applicable State program.

(c) *Requirements.* In addition to requiring compliance with the applicable requirements of this Part and 40 CFR Part 146, Subparts B–F, the Director shall, for each facility meeting the requirements of paragraph (b) of this section, require that the owner or operator comply with the following:

(1) *Notification.* The owner or operator shall comply with the notification requirements of Section 3010 of Pub. L. 94–580.

(2) *Identification number.* The owner or operator shall comply with the requirements of 40 CFR § 264.11.

(3) *Manifest system.* The owner or operator shall comply with the applicable recordkeeping and reporting requirements for manifested wastes in 40 CFR § 264.71.

(4) *Manifest discrepancies.* The owner or operator shall comply with 40 CFR § 264.72.

(5) *Operating record.* The owner or operator shall comply with 40 CFR § 264.73(a), (b)(1), and (b)(2).

(6) *Annual report.* The owner or operator shall comply with 40 CFR § 264.75.

(7) *Unmanifested waste report.* The owner or operator shall comply with 40 CFR § 264.75.

(8) *Personnel training.* The owner or operator shall comply with the applicable personnel training requirements of 40 CFR § 264.16.

(9) *Certification of closure.* When abandonment is completed, the owner or operator must submit to the Director certification by the owner or operator and certification by an independent registered professional engineer that the facility has been closed in accordance with the specifications in § 122.42(f).

(d) *Additional requirements for Class IV wells.* [Reserved].

Subpart D—Additional Requirements for National Pollutant Discharge Elimination System Programs Under the Clean Water Act

§ 122.51 Purpose and scope of Subpart D.

(a) *Content of Subpart D.* The regulations in this Subpart contain the specific requirements for the NPDES permit program. They apply to EPA, and to approved States to the extent set forth in Part 123. Sections of this Subpart which are applicable to States are indicated at the section heading as follows: (applicable to State NPDES programs, see § 123.7). The regulations in this Subpart are supplemental to the requirements in Part 122, Subpart A, which apply to all programs.

(b) *Authority.* (1) Section 301(a) of CWA provides that "Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful."

(2) Section 402(a)(1) of CWA provides in part that "The Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, . . . upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act."

(3) Section 318(a) of CWA provides that "The Administrator is authorized, after public hearings, to permit the discharge of specific pollutant or pollutants under controlled conditions associated with an approved aquaculture project under Federal or State supervision pursuant to section 402 of this Act."

(4) Section 405 of CWA provides, in part, that "Where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 212 of this Act (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 402 of this Act."

(5) Sections 402(b), 318(b) and (c), and 405(c) of CWA authorize EPA approval of State permit programs for discharges from point sources, discharges to aquaculture projects, and disposal of sewage sludge.

(6) Section 304(i) of CWA provides that the Administrator shall promulgate guidelines establishing uniform application forms and other minimum requirements for the acquisition of information from dischargers in approved States and establishing minimum procedural and other elements of approved State NPDES programs.

(7) Section 501(a) of CWA provides that "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act."

(8) Section 101(e) of CWA provides that "Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes."

(c) *Scope of the NPDES permit requirement.* The NPDES program requires permits for the discharge of "pollutants" from any "point source" into "waters of the United States." The terms "pollutant," "point source" and "waters of the United States" are defined in § 122.3.

(1) *Specific inclusions.* The following are point sources requiring NPDES permits for discharges:

(i) Concentrated animal feeding operations as defined in § 122.54;

(ii) Concentrated aquatic animal production facilities as defined in § 122.55;

(iii) Discharges into aquaculture projects as set forth in § 122.56;

(iv) Discharges from separate storm sewers as set forth in § 122.57; and

(v) Silvicultural point sources as defined in § 122.58.

(2) *Specific exclusions.* The following discharges do not require NPDES permits:

(i) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

(ii) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

(iii) The introduction of sewage, industrial wastes, or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also § 122.10(c).) This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other party not leading to treatment works.

(iv) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR § 1510 (The National Oil and Hazardous Substances Pollution Plan) or 33 CFR § 153.10 (e) (Pollution by Oil and Hazardous Substances).

(v) Any introduction of pollutants from non-point-source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.54, discharges from concentrated aquatic animal production facilities as defined in § 122.55, discharges to aquaculture projects as defined in § 122.56, and discharges from silvicultural point sources as defined in § 122.58.

(vi) Return flows from irrigated agriculture.

(vii) Discharges into a privately owned treatment works, except as the Director may otherwise require under § 122.62(m).

§ 122.52 Prohibitions.

(Applicable to State NPDES programs, see § 123.7.)

No permit may be issued:

(a) When the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA;

(b) When the applicant is required to obtain a State or other appropriate certification under section 401 of CWA and § 124.53 and that certification has not been obtained or waived;

(c) By the State Director where the Regional Administrator has objected to issuance of the permit under § 123.76;

(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States;

(e) When, in the judgment of the Secretary, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge;

(f) For the discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste;

(g) For any discharge inconsistent with a plan or plan amendment approved under section 208(b) of CWA;

(h) For any discharge to the territorial sea, the waters of the contiguous zone, or the oceans in the following circumstances:

(1) Before the promulgation of guidelines under section 403(c) of CWA (for determining degradation of the waters of the territorial seas, the contiguous zone, and the oceans) unless the Director determines permit issuance to be in the public interest; or

(2) After promulgation of guidelines under section 403(c) of CWA, when insufficient information exists to made a reasonable judgment whether the discharge complies with them.

(i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by section 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutant load allocation for the pollutants to be discharged, must demonstrate, before the close of the public comment period, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

§ 122.53 Application for a permit.

(Applicable to State NPDES programs except for paragraphs (b), (c) and (h); see § 123.7.)

(a) *Duty to apply.* Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by general permits under § 122.59, excluded under § 122.51, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.62(m), shall submit a complete application (which shall include a BMP program if necessary under 40 CFR § 125.102) to the Director in accordance with § 122.4, paragraphs (b) through (h) of this section, and Part 124.

(b) *Time to apply.* Any person proposing a new discharge shall submit an application at least 180 days before the date on which the discharge is to commence, unless permission for a later date has been granted by the Director. Persons proposing a new discharge are encouraged to submit their applications well in advance of the 180 day requirement to avoid delay. See also paragraph (h).

(c) *Duty to reapply.* (1) Any POTW with a currently effective permit shall submit a new application at least 180 days before the expiration date of the existing permit, unless permission for a later date has been granted by the Director. (The Director shall not grant permission for applications to be submitted later than the expiration date of the existing permit.)

(2) All other permittees with currently effective permits shall submit a new application in accordance with the table below:

Permit expires	Application requirement	Deadline for submission
On or before Nov. 30, 1980	(1) If applicant has submitted new application before April 30, 1980, new application[1] is not required.	Not applicable.
	(2) If applicant has not submitted new application before April 30, 1980, applicant must submit new application[1].	Date on which permit expires.[2]
Dec. 1, 1980-May 31, 1981.	New application[1]	90 days before permit expires.[2,3]
On or after June 1, 1981.	New application[1]	180 days before permit expires.[3]

[1] The new application requirements are set forth in § 122.4(d) and in paragraphs (d) and (e) of this section. Applicants for EPA-issued permits must use Forms 1 and either 2b or 2c of EPA's consolidated permit application forms to apply under those sections.

[2] Applicants may request additional time for the submission of information required by paragraphs (d) (7), (8) and (10) of this section. The request must be in writing and must state the reasons the information could not be submitted on time. Based upon this request, the Director may extend the time to submit all or some of this information up to six months beyond the deadline for submission or June 30, 1981, whichever is earlier.

[3] The Director may grant permission to submit an application later than this date, but no later than the expiration date of the permit.

(d) *Application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers.* Existing manufacturing, commercial, mining, and silvicultural dischargers applying for NPDES permits shall provide the following information to the Director, using application forms provided by the Director:

(1) *Outfall location.* The latitude and longitude to the nearest 15 seconds and the name of the receiving water.

(2) *Line drawing.* A line drawing of the water flow through the facility with a water balance, showing operations contributing wastewater to the effluent and treatment units. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under paragraph (d)(3) of this section. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined (for example, for certain mining activities), the applicant may provide instead a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

(3) *Average flows and treatment.* A narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outfall, including process wastewater, cooling water, and storm water runoff; the average flow which each process contributes; and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Processes, operations or production areas may be described in general terms (for example, "dye-making reactor", "distillation tower".) For a privately owned treatment works, this information shall include the identity of each user of the treatment works.

(4) *Intermittent flows.* If any of the discharges described in paragraph (d)(3) of this section are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence (except for storm water runoff, spillage, or leaks).

(5) *Maximum production.* If an effluent guideline promulgated under section 304 of CWA applies to the applicant and is expressed in terms of production (or other measure of operation), a reasonable measure of the applicant's actual production reported in the units used in the applicable effluent guideline. The reported measure must reflect the actual production of the facility as required by § 122.63(b)(2).

(6) *Improvements.* If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement requirement, a description of the abatement project, and a listing of the required and projected final compliance dates.

(7) *Effluent characteristics.* Information on the discharge of pollutants specified in this subparagraph. When "quantitative data" for a pollutant is required, the applicant must collect a sample of effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 CFR Part 136. When no analytical method is approved the applicant may use any suitable method but must provide a description of the method. When an applicant has two or more outfalls with substantially identical effluents, the Director may allow the applicant to test only one outfall and report that the quantitative data also applies to the substantially identical outfalls. The requirements in paragraphs (d)(7) (iii) and (iv) of this section that an applicant must provide quantitative data for certain pollutants known or believed to be present does not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. Grab samples must be used for pH, temperature, cyanide, total phenols, residual chlorine, oil and grease, and fecal coliform. For all other pollutants, 24-hour composite samples must be used. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.)

(i)(A) Every applicant must report quantitative data for every outfall for the following pollutants:

(*1*) Biochemical Oxygen Demand (BOD_5)

(*2*) Chemical Oxygen Demand

(*3*) Total Organic Carbon

(*4*) Total Suspended Solids

(*5*) Ammonia (as N)

(*6*) Temperature (both winter and summer)

(*7*) pH

(B) At the applicant's request, the Director may waive the reporting requirements for one or more of the pollutants listed in paragraph (d)(7)(i)(A) of this section.

(ii) Each applicant with processes in one or more primary industry category (see Appendix A to Part 122) contributing to a discharge must report quantitative data for the following pollutants in each outfall containing process wastewater:

(A) The organic toxic pollutants in the fractions designated in Table I of Appendix D for the applicant's industrial category or categories unless the applicant qualifies as a small business under paragraph (d)(8) of this section. Table II of Appendix D lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure which uses gas chromotography/mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes.

(B) The pollutants listed in Table III of Appendix D (the toxic metals, cyanide, and total phenols).

(iii) Each applicant must report for each outfall quantitative data for the following pollutants, if the applicant knows or has reason to believe that the pollutant is discharged from the outfall:

(A) All pollutants listed in Table II or Table III of Appendix D (the toxic pollutants) for which quantitative data is not otherwise required under paragraph (d)(7)(ii) of this section except that an applicant qualifying as a small business under paragraph (d)(8) of this section is not required to analyze for the pollutants listed in Table II of Appendix D (the organic toxic pollutants).

(B) All pollutants in Table IV of Appendix D (certain conventional and nonconventional pollutants).

(iv) Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Table V of Appendix D (certain hazardous substances and asbestos) is discharged from each outfall. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged, and report any quantitative data it has for any pollutant.

(v) Each applicant must report qualitative data, generated using a screening procedure not calibrated with analytical standards, for 2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

(A) Uses or manufactures 2,4,5-trichlorophenoxy acetic acid (2,4,5-T); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex, 2,4,5,TP); 2-(2,4,5-trichlorophenoxy) ethyl 2,2-dichloropropionate (Erbon); O,O-dimethyl O-(2,4,5-trichlorophenyl) phosphorothioate (Ronnel); 2,4,5-trichlorophenol (TCP); or hexachlorophene (HCP); or

(B) Knows or has reason to believe that TCDD is or may be present in an effluent.

(8) *Small business exemption.* An applicant which qualifies as a small business under one of the following criteria is exempt from the requirements in paragraphs (d)(7)(ii)(A) or (d)(7)(iii)(A) of this section to submit quantitative data for the pollutants listed in Table II of Appendix D (the organic toxic pollutants):

(i) For coal mines, a probable total annual production of less than 100,000 tons per year.

(ii) For all other applicants, gross total annual sales averaging less than $100,000 per year (in second quarter 1980 dollars).

(9) *Used or manufactured toxics.* A listing of any toxic pollutant which the applicant does or expects that it will during the next 5 years use or manufacture as an intermediate or final product or byproduct.

(10) *Potential discharges.* A description of the expected levels of and the reasons for any discharges of pollutants which the applicant knows or has reason to believe will exceed two times the values reported in paragraph (d)(7) of this section over the next 5 years.

(11) *Biological toxicity tests.* An identification of any biological toxicity tests which the applicant knows or has reason to believe have been made within the last 3 years on any of the applicant's discharges or on a receiving water in relation to a discharge.

(12) *Contract analyses.* If a contract laboratory or consulting firm performed any of the analyses required by paragraph (d)(7) of this section, the identity of each laboratory or firm and the analyses performed.

(13) *Additional information.* In addition to the information reported on the application form, applicants shall provide to the Director, at his or her request, such other information as the Director may reasonably require to assess the discharges of the facility and to determine whether to issue an NPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity of discharges to aquatic life and requirements to determine the cause of the toxicity.

(e) Application requirements for new and existing concentrated animal feeding operations and aquatic animal production facilities. New and existing concentrated animal feeding operations (defined in § 122.54) and concentrated aquatic animal production facilities (defined in § 122.55) shall provide the following information to the Director, using the application form provided by the Director:

(1) For concentrated animal feeding operations:

(i) The type and number of animals in open confinement and housed under roof.

(ii) The number of acres used for confinement feeding.

(iii) The design basis for the runoff diversion and control system, if one exists, including the number of acres of contributing drainage, the storage capacity, and the design safety factor.

(2) For concentrated aquatic animal production facilities:

(i) The maximum daily and average monthly flow from each outfall.

(ii) The number of ponds, raceways, and similar structures.

(iii) The name of the receiving water and the source of intake water.

(iv) For each species of aquatic animals, the total yearly and maximum harvestable weight.

(v) The calendar month of maximum feeding and the total mass of food fed during that month.

(f) Application requirements for new and existing POTWs. [Reserved.]

(g) Application requirements for new sources and new dischargers. (Reserved.)

(h) Special provisions for applications from new sources.

(1) The owner or operator of any facility which may be a new source (as defined in § 122.3) and which is located in a State without an approved NPDES program must comply with the provisions of this paragraph.

(2)(i) Before beginning any on-site construction as defined in § 122.66, the owner or operator of any facility which may be a new source must submit information to the Regional Administrator so that he or she can determine if the facility is a new source. The Regional Administrator may request any additional information needed to determine whether the facility is a new source.

(ii) The Regional Administrator shall make an initial determination whether the facility is a new source within 30 days of receiving all necessary information under paragraph (h)(2)(i) of this section.

(3) The Regional Administrator shall issue a public notice in accordance with § 124.10 of the new source determination under paragraph (h)(2) of this section. If the Regional Administrator has determined that the facility is a new source, the notice shall state that the applicant must comply with the environmental review requirements of 40 CFR Part 6.600 *et seq.*

(4) Any interested person may challenge the Regional Administrator's initial new source determination by requesting an evidentiary hearing under Subpart E of Part 124 within 30 days of issuance of the public notice of the initial determination. The Regional Administrator may defer the evidentiary hearing on the determination until after a final permit decision is made, and consolidate the hearing on the determination with any hearing on the permit.

(i) *Variance requests by non-POTWs.* A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified in this paragraph:

(1) *Fundamentally different factors.* A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be made by the close of the public comment period under § 124.10. The request shall explain how the requirements of § 124.13 and 40 CFR Part 125, Subpart D have been met.

(2) *Non-conventional pollutants.* A request for a variance from the BAT requirements for CWA section 301(b)(2)(F) pollutants (commonly called "non-conventional" pollutants) pursuant

to section 301(c) of CWA because of the economic capability of the owner or operator, or pursuant to section 301(g) of CWA because of certain environmental considerations, when those requirements were based on effluent limitation guidelines, must be made by:

(i) Submitting an initial request to the Regional Administrator, as well as to the State Director if applicable, stating the name of discharger, the permit number, the outfall number(s), the applicable effluent guideline, and whether the discharger is requesting a section 301(c) or section 301(g) modification or both. This request must have been filed not later than:

(A) September 25, 1978, for a pollutant which is controlled by a BAT effluent limitation guideline promulgated before December 27, 1977; or

(B) 270 days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 27, 1977; and

(ii) Submitting a completed request no later than the close of the public comment period under § 124.10 demonstrating that the requirements of § 124.13 and the applicable requirements of Part 125 have been met.

(iii) Requests for variance from effluent limitations not based on effluent limitation guidelines, need only comply with paragraph (i)(2)(ii) of this section and need not be preceded by an initial request under paragraph (i)(2)(i) of this section.

(3) *Delay in construction of POTW.* An extension under CWA section 301(i)(2) of the statutory deadlines in sections 301(b)(1)(A) or (b)(1)(C) of CWA based on delay in completion of a POTW into which the source is to discharge must have been requested on or before June 26, 1978, or 180 days after the relevant POTW requested an extension under paragraph (j)(2) of this section, whichever is later, but in no event may this date have been later than December 25, 1978. The request shall explain how the requrements of 40 CFR Part 125, Subpart J have been met.

(4) *Innovative technology.* An extension under CWA section 301(k) from the statutory deadline of section 301(b)(2)(A) for best available technology based on the use of innovative technology may be requested no later than the close of the public comment period under § 124.10 for the discharger's initial permit requiring compliance with section 301(b)(2)(A). The request shall demonstrate that the requirements of § 124.13 and Part 125, Subpart C have been met.

(5) *Water quality related effluent limitations.* A modification under section 302(b)(2) of requirements under section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.

(6) *Thermal discharges.* A variance under CWA section 316(a) for the thermal component of any discharge must be filed with a timely application for a permit under this section, except that if thermal effluent limitations are established under CWA section 402(a)(1) or are based on water quality standards the request for a variance may be filed by the close of the public comment period under § 124.10. A copy of the request as required under 40 CFR Part 125, Subpart H, shall be sent simultaneously to the appropriate State or interstate certifying agency as required under 40 CFR Part 125. (See § 124.65 for special procedures for section 316(a) thermal variances.)

(j) *Variance requests by POTWs.* A discharger which is a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory provisions as specified in this paragraph:

(1) *Discharges into marine waters.* A preliminary request for a modification under CWA section 301(h) of requirements of CWA section 301(b)(1)(B) for discharges into marine waters must have been submitted to the Agency no later than September 25, 1978. A final request must be submitted in accordance with the filing requirements of 40 CFR Part 125, Subpart G, after that Subpart is promulgated, and shall demonstrate that all the requirements of 40 CFR Part 125, Subpart G have been met. (See § 124.64 for special rules for CWA section 301(h) modifications.)

(2) *Delay in construction.* An extension under CWA section 301(i)(1) of the statutory deadlines in CWA sections 301(b)(1)(B) or (b)(1)(C) based on delay in the construction of the POTW must have been requested on or before June 26, 1978.

(3) *Water quality based effluent limitation.* A modification under CWA section 302(b)(2) of the requirements under section 302(a) for achieving water quality based effluent limitations shall be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.

(k) *Expedited variance procedures and time extensions.* (1) Notwithstanding the time requirements in paragraphs (i) and (j) of this section, the Director may notify a permit applicant before a draft permit is issued under § 124.6 that the draft permit will likely contain limitations which are eligible for variances. In the notice the Director may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of 40 CFR Part 125 applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application has been submitted. The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance.

(2) A discharger who cannot file a complete request required under paragraphs (i)(2)(ii) or (i)(2)(iii) of this section may request an extension. The extension may be granted or denied at the discretion of the Director. Extensions shall be no more than 6 months in duration.

§ 122.54 Concentrated animal feeding operations.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* Concentrated animal feeding operations are point sources subject to the NPDES permit program.

(b) *Definitions.*

(1) "Animal feeding operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) Two or more animal feeding operations under common ownership are considered, for the purposes of these regulations, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) "Concentrated animal feeding operation" means an "animal feeding operation" which meets the criteria in Appendix B, or which the Director designates under paragraph (c) of this section.

(c) *Case-by-case designation of concentrated animal feeding operations.* (1) The Director may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the United States. In making this designation the Director shall consider the following factors:

(i) The size of the animal feeding operation and the amount of wastes reaching waters of the United States;

(ii) The location of the animal feeding operation relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into waters of the United States; and

(v) Other relevant factors.

(2) No animal feeding operation with less than the numbers of animals set forth in Appendix B shall be designated as a concentrated animal feeding operation unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(3) A permit application shall not be required from a concentrated animal feeding operation designated under this paragraph until the Director has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program.

§ 122.55 Concentrated aquatic animal production facilities.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the NPDES permit program.

(b) *Definition.* "Concentrated aquatic animal production facility" means a hatchery, fish farm, or other facility which meets the criteria in Appendix C, or which the Director designates under paragraph (c) of this section.

(c) *Case-by-case designation of concentrated aquatic animal production facilities.* (1) The Director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters of the United States. In making this designation the Director shall consider the following factors:

(i) The location and quality of the receiving waters of the United States;

(ii) The holding, feeding, and production capacities of the facility;

(iii) The quantity and nature of the pollutants reaching waters of the United States; and

(iv) Other relevant factors.

(2) A permit application shall not be required from a concentrated aquatic animal production facility designated under this paragraph until the Director has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

§ 122.56 Aquaculture projects.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* Discharges into aquaculture projects, as defined in this section, are subject to the NPDES permit program through section 318 of CWA, and in accordance with 40 CFR Part 125, Subpart B.

(b) *Definitions.* (1) "Aquaculture project" means a defined managed water area which uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals.

(2) "Designated project area" means the portions of the waters of the United States within which the permittee or permit applicant plans to confine the cultivated species, using a method or plan or operation (including, but not limited to, physical confinement) which, on the basis of reliable scientific evidence, is expected to ensure that specific individual organisms comprising an aquaculture crop will enjoy increased growth attributable to the discharge of pollutants, and be harvested within a defined geographic area.

§ 122.57 Separate storm sewers.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* Separate storm sewers, as defined in this section are point sources subject to the NPDES permit program. Separate storm sewers may be permitted either individually or under a general permit (see § 122.59). An NPDES permit for discharges into waters of the United States from a separate storm sewer covers all conveyances which are a part of that separate storm sewer system, even though there may be several owners or operators of these conveyances. However, discharges into separate storm sewers from point sources which are not part of the separate storm sewer systems may also require a permit.

(b) *Definition.* (1) "Separate storm sewer" means a conveyance or system of conveyances (including pipes, conduits, ditches, and channels) primarily used for collecting and conveying storm water runoff and which is either:

(i) Located in an urbanized areas as designated by the Bureau of the Census according to the criteria in 39 FR 15202 (May 1, 1974); or

(ii) Not located in an urbanized area but designated under paragraph (c) of this section.

(2) Except as provided in paragraph (b)(3) of this section, a conveyance or system of conveyances operated primarily for the purpose of collecting and conveying storm water runoff which is not located in an urbanized area and has not been designated by the Director under paragraph (c) of this section is not considered a point source and is not subject to the provisions of this section.

(3) Conveyances which discharge process wastewater or storm water runoff contaminated by contact with wastes, raw materials, or pollutant-contaminated soil, from lands or facilities used for industrial or commercial activities, into waters of the United States or into separate storm sewers are point sources that must obtain NPDES permits but are not separate storm sewers.

(4) Whether a system of conveyances is or is not a separate storm sewer for purposes of this section shall have no bearing on whether the system is eligible for funding under Title II of CWA; see 40 CFR § 35.925–21.

(c) *Case-by-case designation of separate storm sewers.* The Director may designate a storm sewer not located in an urbanized area as a separate storm sewer. This designation may be made to the extent allowed or required by EPA promulgated effluent guidelines for point sources in the separate storm sewer category; or when:

(1) A Water Quality Management plan under section 208 of CWA which contains requirements applicable to such point sources is approved; or

(2) The Director determines that a storm sewer is a significant contributor of pollution to the waters of the United States. In making this determination the Director shall consider the following factors:

(i) The location of the discharge with respect to waters of the United States:

(ii) The size of the discharge;

(iii) The quantity and nature of the pollutants reaching waters of the United States; and

(iv) Other relevant factors.

§ 122.58 Silvicultural activities.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Permit requirement.* Silvicultural point sources, as defined in this section, are point sources subject to the NPDES permit program.

(b) *Definitions.* (1) "Silvicultural point source" means any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (see 33 CFR § 209.120 and Part 123, Subpart E).

(2) "Rock crushing and gravel washing facilities" means facilties which process crushed and broken stone, gravel, and riprap (see 40 CFR Part 436, Subpart B, including the effluent limitations guidelines).

(3) "Log sorting and log storage facilities" means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR Part 429, Subpart J, including the effluent limitations guidelines).

§ 122.59 General permits.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Coverage.* The Director may issue a general permit in accordance with the following:

(1) *Area.* The general permit shall be written to cover a category of discharges described in the permit under paragraph (a)(2) of this section, except those covered by individual permits, within a geographic area. The area shall correspond to existing geographic or political boundaries, such as:

(i) Designated planning areas under sections 208 and 303 of CWA;

(ii) Sewer districts or sewer authorities;

(iii) city, county, or State political boundaries;

(iv) State highway systems;

(v) Standard metropolitan statistical areas as defined by the Office of Management and Budget;

(vi) Urbanized areas as designated by the Bureau of the Census according to criteria in 30 FR 15202 (May 1, 1974); or

(vii) Any other appropriate division or combination of boundaries.

(2) *Sources.* The general permit shall be written to regulate, within the area described in paragraph (a)(1) of this section, either:

(i) Separate storm sewers; or

(ii) A category of point sources other than separate storm sewers if the sources all:

(A) Involve the same or substantially similar types of operations;

(B) Discharge the same types of wastes;

(C) Require the same effluent limitations or operating conditions;

(D) Require the same or similar monitoring; and

(E) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

(b) *Administration.*—(1) *In general.* General permits may be issued, modified, revoked and reissued, or terminated in accordance with applicable requirements of Part 124 or corresponding State regulations. Special procedures for issuance are found at § 123.76 for States and § 124.58 for EPA.

(2) *Requiring an individual permit.* (i) The Director may require any person authorized by a general permit to apply for and obtain an individual NPDES permit. Any interested person may petition the Director to take action under this subparagraph. Cases where an individual NPDES permit may be required include the following:

(A) The discharge(s) is a significant contributor of pollution as determined by the factors set forth at § 122.57(c)(2);

(B) The discharger is not in compliance with the conditions of the general NPDES permit;

(C) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;

(D) Effluent limitation guidelines are promulgated for point sources covered by the general NPDES permit;

(E) A Water Quality Management plan containing requirements applicable to such point sources is approved; or

(F) The requirements of paragraph (a) of this section are not met.

(ii) *For EPA issued general permits only,* the Regional Administrator may require any owner or operator authorized by a general permit to apply for an individual NPDES permit as provided in paragraph (b)(2)(i) of this section, only if the owner or operator has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that on the effective date of the individual NPDES permit the general permit as it applies to the individual permittee shall automatically terminate. The Director may grant additional time upon request of the applicant.

(iii) Any owner or operator authorized by a general permit may request to be excluded from the coverage of the general permit by applying for an individual permit. The owner or operator shall submit an application under § 122.53, with reasons supporting the request, to the Director no later than 90 days after the publication by EPA of the general permit in the Federal Register or the publication by a State in accordance with applicable State law. The request shall be processed under Part 124 or applicable State procedures. The request shall be granted by issuing of any individual permit if the reasons cited by the owner or operator are adequate to support the request.

(iv) When an individual NPDES permit is issued to an owner or operator otherwise subject to a general NPDES permit, the applicability of the general permit to the individual NPDES permittee is automatically terminated on the effective date of the individual permit.

(v) A source excluded from a general permit solely because it already has an individual permit may request that the individual permit be revoked, and that it be covered by the general permit. Upon revocation of the individual permit, the general permit shall apply to the source.

§ 122.60 Additional conditions applicable to all NPDES Permits.

(Applicable to State NPDES programs, see § 123.7.)

The following conditions, in addition to those set forth in § 122.7, apply to all NPDES permits:

(a) In addition to § 122.7(a) (duty to comply):

(1) The permittee shall comply with effluent standards or prohibitions established under section 307(a) of the Clean Water Act for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

(2) The Clean Water Act provides that any person who violates a permit

condition implementing sections 301, 302, 306, 307, 308, 318, or 405 of the Clean Water Act is subject to a civil penalty not to exceed $100,000 per day of such violation. Any person who willfully or negligently violates permit conditions implementing sections 301, 302, 306, 307, or 308 of the Clean Water Act is subject to a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or both.

(b) In addition to § 122.7(c) (duty to halt or reduce activity), upon reduction, loss, or failure of the treatment facility, the permittee shall, to the extent necessary to maintain compliance with its permit, control production or all discharges or both until the facility is restored or an alternative method of treatment is provided. This requirement applies, for example, when the primary source of power of the treatment facility fails or is reduced or lost.

(c) In addition to § 122.7(j) (monitoring):

(1) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

(2) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

(d) In addition to § 122.7(k) (signatories): the Clean Water Act provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than $10,000 per violation, or by imprisonment for not more than 6 months per violation, or by both.

(e) In addition to § 122.7(l)(3) (monitoring reports):

(1) Monitoring results must be reported on a Discharge Monitoring Report (DMR).

(2) If the permittee monitors any pollutant more frequently than required by the permit, using test procedures approved under 40 CFR 136 or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR.

(3) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

(f)(1) The following shall be included as information which must be reported within 24 hours under § 122.7(l)(5) (24-hour reporting):

(i) Any unanticipated bypass which exceeds any effluent limitation in the permit. (See § 122.60(g) below.)

(ii) Any upset which exceeds any effluent limitation in the permit.

(iii) Violation of a maximum daily discharge limitation for any of the pollutants listed by the Director in the permit to be reported within 24 hours. (See § 122.62(g).)

(2) The Director may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

(g) *Bypass*—(1) *Definitions.* (i) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

(ii) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

(2) *Bypass not exceeding limitations.* The permittee may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of paragraphs (g)(3) and (g)(4) of this section.

(3) *Notice.*—(i) *Anticipated bypass.* If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(ii) *Unanticipated bypass.* The permittee shall submit notice of an unanticipated bypass as required in paragraph (f) of this section (24-hour notice).

(4) *Prohibition of bypass.* (i) Bypass is prohibited, and the Director may take enforcement action against a permittee for bypass, unless:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if the permittee could have installed adequate backup equipment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(C) The permittee submitted notices as required under paragraph (g)(3) of this section.

(ii) The Director may approve an anticipated bypass, after considering its adverse effects, if the Director determines that it will meet the three conditions listed above in paragraph (g)(4)(i) of this section.

(h) *Upset.*—(1) *Definition.* "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

(2) *Effect of an upset.* An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of paragraph (h)(3) of this section are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

(3) *Conditions necessary for a demonstration of upset.* A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An upset occurred and that the permittee can identify the specific cause(s) of the upset;

(ii) The permitted facility was at the time being properly operated; and

(iii) The permittee submitted notice of the upset as required in paragraph (f) of this section (24-hour notice).

(iv) The permittee complied with any remedial measures required under § 122.7(d).

(4) *Burden of proof.* In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

§ 122.61 Additional conditions applicable to specified categories of NPDES permits.

(Applicable to state NPDES programs, see § 123.7.)

The following conditions, in addition to those set forth in § 122.7 and § 122.60, apply to all NPDES permits within the categories specified below:

(a) *Existing manufacturing, commercial, mining, and silvicultural dischargers.* In addition to the reporting requirements under § 122.7(l) and § 122.60, all existing manufacturing, commercial, mining, and silvicultural dischargers must notify the Director as soon as they know or have reason to believe:

(1) That any activity has occurred or will occur which would result in the discharge of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following "notification levels:"

(i) One hundred micrograms per liter (100 µg/l);

(ii) Two hundred micrograms per liter (200 µg/l) for acrolein and acrylonitrile; five hundred micrograms per liter (500 µg/l) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/l) for antimony;

(iii) Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with §122.53(d)(7) or § 122.53(d)(10); or

(iv) The level established by the Director in accordance with § 122.62(f).

(2) That they have begun or expect to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application under § 122.53(d)(9).

(b) *Publicly owned treatment works.* All POTWs must provide adequate notice to the Director of the following:

(1) Any new introduction of pollutants into that POTW from an indirect discharger which would be subject to sections 301 or 306 of CWA if it were directly discharging those pollutants; and

(2) Any substantial change in the volume or character of pollutants being introduced into that POTW by a source introducing pollutants into the POTW at the time of issuance of the permit.

(3) For purposes of this paragraph, adequate notice shall include information on (i) the quality and quantity of effluent introduced into the POTW, and (ii) any anticipated impact of the change on the quantity or quality of effluent to be discharged from the POTW.

§ 122.62 Establishing NPDES permit conditions.

(Applicable to State NPDES programs, see § 123.7.)

In addition to the conditions established under § 122.8(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a) *Technology-based effluent limitations and standards* based on effluent limitations and standards promulgated under section 301 of CWA or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or on a combination of the two, in accordance with § 125.3. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.67(d) (protection period).

(b) *Other effluent limitations and standards* under sections 301, 302, 303, 307, 318, and 405 of CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, the Director shall institute proceedings under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. See also § 122.60(a).

(c) *Reopener clause:* for any discharger within a primary industry category (see Appendix A), requirements under section 307(a)(2) of CWA as follows:

(1) *On or before June 30, 1981:* (i) If applicable standards or limitations have not yet been promulgated, the permit shall include a condition stating that, if an applicable standard or limitation is promulgated under sections 301(b)(2) (C) and (D), 304(b)(2), and 307(a)(2) and that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not limited in the permit, the permit shall be promptly modified or revoked and reissued to conform to that effluent standard or limitation.

(ii) If applicable standards or limitations have been promulgated or approved, the permit shall include those standards or limitations. (If EPA approves existing effluent limitations or decides not to develop new effluent limitations, it will publish a notice in the **Federal Register** that the limitations are "approved" for the purpose of this regulation.)

(2) *After June 30, 1981,* any permit issued shall include effluent limitations and a compliance schedule to meet the requirements of sections 301(b)(2) (A), (C), (D), (E) and (F) of CWA, whether or not applicable effluent limitations guidelines have been promulgated or approved. These permits need not incorporate the clause required by paragraph (c)(1) of this section.

(3) The Director shall promptly modify or revoke and reissue any permit containing the clause required under paragraph (c)(1) of this section to incorporate an applicable effluent standard or limitation under sections 301(b)(2) (C) and (D), 304(b)(2), and 307(a)(2) which is promulgated or approved after the permit is issued if that effluent standard or limitation is more stringent than any effluent limitation in the permit, or controls a pollutant not limited in the permit.

(d) *Water quality standards and State requirements:* any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of CWA;

(2) Attain or maintain a specified water quality through water quality-related effluent limits established under section 302 of CWA;

(3) Conform to the conditions of a State certification under section 401 of CWA which meet the requirements of § 124.53 when EPA is the permit issuing authority; however, if a State certification is stayed by a court of competent jurisdiction or appropriate State board or agency, EPA shall include conditions in the permit which may be necessary to meet EPA's obligation under section 301(b)(1)(C) of CWA;

(4) Conform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State;

(5) Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA;

(6) Ensure consistency with the requirements of a Water Quality Management plan approved by EPA under section 208(b) of CWA;

(7) Incorporate section 403(c) criteria under Part 125, Subpart M, for ocean discharges;

(8) Incorporate alternative effluent limitations or standards where warranted by "fundamentally different factors," under 40 CFR Part 125, Subpart D;

(9) Incorporate any other requirements, conditions, or limitations into a new source permit under the National Environmental Policy Act 42 U.S.C. §§ 4321 *et seq.* and section 511 of CWA, when EPA is the permit issuing authority (see § 122.66).

(e) *Toxic pollutants:* limitations established under paragraphs (a), (b), or

(d) of this section, to control pollutants meeting the criteria listed in paragraph (e)(1) of this section. Limitations will be established in accordance with paragraph (e)(2) of this section. An explanation of the development of these limitations shall be included in the fact sheet under § 122.56(b)(1)(i).

(1) Limitations must control all toxic pollutants which:

(i) The Director determines (based on information reported in a permit application under § 122.53(d) (7) or (10) or in a notification under § 122.61(a)(1) or on other information) are or may be discharged at a level greater than the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c); or

(ii) The discharger does or may use or manufacture as an intermediate or final product or byproduct.

(2) The requirement that the limitations control the pollutants meeting the criteria of paragraph (e)(1) of this section will be satisfied by:

(i) Limitations on those pollutants; or

(ii) Limitations on other pollutants which, in the judgment of the Director, will provide treatment of the pollutants under paragraph (e)(1) of this section to the levels required by § 125.3(c).

(f) *Notification level:* a "notification level" which exceeds the notification level of § 122.61(a)(1) (i), (ii), or (iii), upon a petition from the permittee or on the Director's initiative. This new notification level may not exceed the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under § 125.3(c).

(g) *Twenty-four hour reporting:* Pollutants for which the permittee must report violations of maximum daily discharge limitations under § 122.60(f)(3) (24-hour reporting) shall be listed as such in the permit. This list shall include any toxic pollutant or hazardous substance, or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

(h) *Durations* for permits, as set forth in §§ 122.9(a) and 122.64.

(i) *Monitoring requirements:* In addition to § 122.11, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate; including pollutants in internal waste streams under § 122.63(i); pollutants in intake water for net limitations under § 122.63(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.63(e); and pollutants subject to notification requirements under § 122.61(a).

(iv) According to test procedures approved under 40 CFR Part 136 for the analyses of pollutants having approved methods under that Part, and according to a test procedure specified in the permit for pollutants with no approved methods.

(2) Requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(j) *Pretreatment program for POTWs.* Requirements for POTWs to:

(1) Identify, in terms of character and volume of pollutants, any significant indirect dischargers into the POTW subject to pretreatment standards under section 307(b) of CWA and 40 CFR Part 403.

(2) Submit a local program when required by and in accordance with 40 CFR Part 403 to assure compliance with pretreatment standards to the extent applicable under section 307(b). The local program shall be incorporated into the permit as described in 40 CFR Part 403. The program shall require all indirect dischargers to the POTW to comply with the reporting requirements of 40 CFR Part 403.

(k) *Best management practices* to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of CWA for the control of toxic pollutants and hazardous substances from ancillary activities;

(2) Numeric effluent limitations are infeasible, or

(3) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of CWA.

(l) *Reissued permits:*

(1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim limitations, standards or conditions which are at least as stringent as the final limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.15).

(2) When effluent limitations were imposed under section 402(a)(1) of CWA in a previously issued permit and these limitations are more stringent than the subsequently promulgated effluent guidelines, this paragraph shall apply unless:

(i) The discharger has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the renewed or reissued permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by the subsequently promulgated effluent limitation guidelines);

(ii) In the case of an approved State, State law prohibits permit conditions more stringent than an applicable effluent limitations guideline;

(iii) The subsequently promulgated effluent guidelines are based on best conventional pollutant control technology (section 301(b)(2)(E) of CWA);

(iv) The circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance under § 122.15; or

(v) There is increased production at the facility which results in significant reduction in treatment efficiency, in which case the permit limitations will be adjusted to reflect any decreased efficiency resulting from increased production and raw waste loads, but in no event shall permit limitations be less stringent than those required by subsequently promulgated standards and limitations.

(m) *Privately owned treatment works.* For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements under this Part. Alternatively, the Director may issue separate permits to the treatment works and to its users, or may require a separate permit application from any user. The Director's decision to issue a permit with no conditions applicable to any user, to impose conditions on one or more users, to issue separate permits, or to require separate applications, and the basis for that decision, shall be stated in the fact sheet for the draft permit for the treatment works.

(n) *Grants.* Any conditions imposed in grants made by the Administrator to POWs under sections 201 and 204 of CWA which are reasonably necessary for the achievement of effluent limitations under section 301 of CWA.

(o) *Sewage sludge.* Requirements under section 405 of CWA governing the disposal of sewage sludge from publicly owned treatment works, in accordance with any applicable regulations.

(p) *Coast Guard.* When a permit is issued to a facility that may operate at certain times as a means of transportation over water, a condition that the discharge shall comply with any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, that establish specifications for safe transportation, handling, carriage, and storage of pollutants.

(q) *Navigation.* Any conditions that the Secretary of the Army considers necessary to ensure that navigation and anchorage will not be substantially impaired, in accordance with § 124.58.

§ 122.63 Calculating NPDES permit conditions.

(Applicable to State NPDES programs, see § 123.7.)

(a) *Outfalls and discharge points.* All permit effluent limitations, standards, and prohibitions shall be established for each outfall or discharge point of the permitted facility, except as otherwise provided under § 122.62(k)(2) (BMPs where limitations are infeasible) and paragraph (i) of this section (limitations on internal waste streams).

(b) *Production-based limitations.* (1) In the case of POTWs, permit limitations, standards, or prohibitions shall be calculated based on design flow.

(2) Except in the case of POTWs, calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility, such as the production during the high month of the previous year, or the monthly average for the highest of the previous 5 years. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitations; for example, monthly production shall be used to calculate average monthly discharge limitations.

(c) *Metals.* All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of the total metal (that is, the sum of the dissolved and suspended fractions of the metal) unless:

(1) An applicable effluent standard or limitation has been promulgated under CWA and specifies the limitation for the metal in the dissolved or valent form; or

(2) In establishing permit limitations on a case-by-case basis under § 125.3, it is necessary to express the limitation on the metal in the dissolved or valent form in order to carry out the provisions of CWA.

(d) *Continuous discharges.* For continuous discharges all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, shall unless impracticable be stated as:

(1) Maximum daily and average monthly discharge limitations for all dischargers other than publicly owned treatment works; and

(2) Average weekly and average monthly discharge limitations for POTWs.

(e) *Non-continuous discharges.* Discharges which are not continuous, as defined in § 122.3, shall be particularly described and limited, considering the following factors, as appropriate:

(1) Frequency (for example, a batch discharge shall not occur more than once every 3 weeks);

(2) Total mass (for example, not to exceed 100 kilograms of zinc and 200 kilograms of chromium per batch discharge);

(3) Maximum rate of discharge of pollutants during the discharge (for example, not to exceed 2 kilograms of zinc per minute); and

(4) Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure (for example, shall not contain at any time more than 0.1 mg/l zinc or more than 250 grams (1/4 kilogram) of zinc in any discharge).

(f) *Mass limitations.* (1) All pollutants limited in permits shall have limitations, standards, or prohibitions expressed in terms of mass except:

(i) For pH, temperature, radiation, or other pollutants which cannot appropriately be expressed by mass;

(ii) When applicable standards and limitations are expressed in terms of other units of measurement; or

(iii) If in establishing permit limitations on a case-by-case basis under § 125.3, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation (for example, discharges of TSS from certain mining operations), and permit conditions ensure that dilution will not be used as a substitute for treatment.

(2) Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.

(g) *Pollutants in intake water.* Except as provided in paragraph (h) of this section, effluent limitations imposed in permits shall not be adjusted for pollutants in the intake water.

(h) *Net limitations.* (1) Upon request of the discharger, effluent limitations or standards imposed in a permit shall be calculated on a "net" basis; that is, adjusted to reflect credit for pollutants in the discharger's intake water, if the discharger demonstrates that its intake water is drawn from the same body of water into which the discharge is made and if:

(i)(A) The applicable effluent limitations and standards contained in 40 CFR Subchapter N specifically provide that they shall be applied on a net basis; or

(B) The discharger demonstrates that pollutants present in the intake water will not be entirely removed by the treatment systems operated by the discharger; and

(ii) The permit contains conditions requiring:

(A) The permittee to conduct additional monitoring (for example, for flow and concentration of pollutants) as necessary to determine continued eligibility for and compliance with any such adjustments; and

(B) The permittee to notify the Director if eligibility for an adjustment under this section has been altered or no longer exists. In that case, the permit may be modified accordingly under § 122.15.

(2) Permit effluent limitations or standards adjusted under this paragraph shall be calculated on the basis of the amount of pollutants present after any treatment steps have been performed on the intake water by or for the discharger. Adjustments under this paragraph shall be given only to the extent that pollutants in the intake water which are limited in the permit are not removed by the treatment technology employed by the discharger. In addition, effluent limitations or standards shall not be adjusted to the extent that the pollutants in the intake water vary physically, chemically, or biologically from the pollutants limited in the permit. Nor shall effluent limitations or standards be adjusted to the extent that the discharger significantly increases concentrations of pollutants in the intake water, even though the total amount of pollutants might remain the same.

(i) *Internal waste streams.* (1) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring required by § 122.62(i) shall also be applied to the internal waste streams.

(2) Limits on internal waste streams will be imposed only when the fact sheet under § 124.56 sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible (for example, under 10 meters of water), the wastes at the point of discharge are so diluted as to make monitoring impracticable, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

(j) *Disposal of pollutants into wells, into POTWs, or by land application.* Permit limitations and standards shall be calculated as provided in § 122.65.

§ 122.64 Duration of certain NPDES permits.

(Applicable to State NPDES programs, see § 123.7.)

(a) On or before June 30, 1981, any permit issued to a discharger in a primary industry category (see Appendix A):

(1) Shall meet one of the following conditions:

(i) Expire on June 30, 1981;

(ii) Incorporate effluent standards and limitations applicable to the discharger which have been promulgated or approved under sections 301(b)(2) (C) and (D), 304(b)(2), and 307(a)(2) of CWA; or

(iii) Incorporate the "reopener clause" required by § 122.62(c)(1), and effluent limitations to meet the requirements of sections 301(b)(2) (A), (C), (D), (E), and (F) of CWA.

(2) Shall not be written to expire after June 30, 1981 unless the discharger has submitted to the Director the information required by § 122.53(d)(7)(ii).

(b) After June 30, 1981 a permit may be issued for the full term if the permit includes effluent limitations and a compliance schedule to meet the requirements of sections 301(b)(2) (A), (C), (D), (E), and (F) of CWA, whether or not applicable effluent limitations guidelines have been promulgated or approved.

(c) A determination that a particular discharger falls within a given industrial category for purposes of setting a permit expiration date under paragraph (b) of this section is not conclusive as to the discharger's inclusion in that industrial category for any other purposes, and does not prejudice any rights to challenge or change that inclusion at the time that a permit based on that determination is formulated.

§ 122.65 Disposal of pollutants into wells, into publicly owned treatment works, or by land application.

(Applicable to State NPDES programs, see § 123.7.)

(a) When part of a discharger's process wastewater is not being discharged into waters of the United States or contiguous zone because it is disposed into a well, into a POTW, or by land application thereby reducing the flow or level of pollutants being discharged into waters of the United States, applicable effluent standards and limitations for the discharge in an NPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one of the following methods:

(1) If none of the waste from a particular process is discharged into waters of the United States, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

(2) In all cases other than those described in paragraph (a)(1) of this section, effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into waters of the United States, and dividing the result by the total wastewater flow. Effluent limitations and standards so calculated may be further adjusted under Part 125, Subpart D to make them more stringent if discharges to wells, publicly owned treatment works, or by land application change the character or treatability of the pollutants being discharged to receiving waters.

This method may be algebraically expressed as:

$$P = E \times N/T$$

where P is the permit effluent limitation, E is the limitation derived by applying effluent guidelines to the total waste stream, N is the wastewater flow to be treated and discharged to waters of the United States, and T is the total wastewater flow.

(b) Paragraph (a) of this section shall not apply to the extent that promulgated effluent limitations guidelines:

(1) Control concentrations of pollutants discharged but not mass; or

(2) Specify a different specific technique for adjusting effluent limitations to account for well injection, land application, or disposal into POTWs.

(c) Paragraph (a) of this section does not alter a discharger's obligation to meet any more stringent requirements established under § 122.7, § 122.8, § 122.60, § 122.61, and § 122.62.

§ 122.66 New sources and new dischargers.

(a) *Definitions.* (1) "New source" and "new discharger" are defined in § 122.3.

(2) "Source" means any building, structure, facility, or installation from which there is or may be a discharge of pollutants.

(3) "Existing source" means any source which is not a source or a new discharger.

(4) "Site" is defined in § 122.3;

(5) "Facilities or equipment" means buildings, structures, process or production equipment or machinery which form a permanent part of the new source and which will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source or water pollution treatment for the source.

(b) *Criteria for new source determination.* (1) The following construction activities result in a new source:

(i) Construction of a source on a site at which no other source is located, or

(ii) Construction on a site at which another source is located of a building, structure, facility, or installation from which there is or may be a discharge of pollutants if:

(A) the process or production equipment that causes the discharge of pollutants from the existing source is totally replaced by this construction, or

(B) the construction results in a change in the nature or quantity of pollutants discharged.

(2) Construction on a site at which an existing source is located results in a modification subject to § 122.15 rather than a new source if the construction does not create a new building, structure, facility, or installation from which there is or may be a discharge of pollutants but otherwise alters, replaces, or adds to existing process or production equipment.

(3) Construction of a new source as defined under § 122.3 has commenced if the owner or operator has: (i) Begun, or caused to begin as part of a continous on-site construction program:

(A) Any placement, assembly, or installation of facilities or equipment; or

(B) Significant site preparation work including clearing, excavation, or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

(ii) Entered a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility, engineering, and design studies do not constitute a contractual obligation under the paragraph.

(c) *Requirement for an Environmental Impact Statement.* (1) The issuance of an NPDES permit to new source:

(i) By EPA may be a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 33 U.S.C. 4321 *et seq.* and is subject to the environmental review provisions of NEPA as set out in 40 CFR Part 6, Subpart F. EPA will determine whether an Environmental Impact Statement (EIS) is required under § 122.53(h) (special provisions for applications from new sources) and 40 CFR Part 6, Subpart F;

(ii) By an NPDES approved State is not a Federal action and therefore does not require EPA to conduct an environmental review.

(2) An EIS prepared under this paragraph shall include a recommendation either to issue or deny the permit.

(i) If the recommendation is to deny the permit, the final EIS shall contain the reasons for the recommendation and list those measures, if any, which the applicant could take to cause the recommendation to be changed;

(ii) If the recommendation is to issue the permit, the final EIS shall recommend the actions, if any, which the permittee should take to prevent or minimize any adverse environmental impacts;

(3) The Regional Administrator shall issue, condition, or deny the new source NPDES permit following a complete evaluation of any significant beneficial and adverse environmental impacts and a review of the recommendations contained in the EIS or finding of no significant impact.

(4)(i) No on-site construction of a new source for which an EIS is required shall commence before final Agency action in issuing a final permit incorporating appropriate EIS-related requirements, or before execution by the applicant of a legally-binding written agreement which requires compliance with all such requirements, unless such construction is determined by the Regional Administrator not to cause significant or irreversible adverse environmental impact. The provisions of any agreement entered into under this paragraph shall be incorporated as conditions of the NPDES permit when it is issued.

(ii) No on-site construction of a new source for which an EIS is not required shall commence until 30 days after issuance of a finding of no significant impact, unless the construction is determined by the Regional Administrator not to cause significant adverse environmental impacts.

(5) The permit applicant must notify the Regional Administrator of any on-site construction which begins before the times specified in paragraph (c)(4) of this section. If onsite construction begins in violation of this paragraph, the Regional Administrator shall advise the owner or operator that it is proceeding with construction at its own risk, and that such construction activities constitute grounds for denial of a permit. The Regional Administrator may seek a court order to enjoin construction in violation of this paragraph.

(d) *Effect of compliance with new source performance standards.* (The provisions of this paragraph do not apply to existing sources which modify their pollution control facilities or construct new pollution control facilities and achieve performance standards, but which are neither new sources or new dischargers or otherwise do not meet the requirements of this paragraph.)

(1) Except as provided in paragraph (d)(2) of this section, any new discharger, the construction of which commenced after October 18, 1972, or new source which meets the applicable promulgated new source performance standards before the commencement of discharge, may not be subject to any more stringent new source performance standards or to any more stringent technology-based standards under section 301(b)(2) of CWA for the soonest ending of the following periods:

(i) Ten years from the date that construction is completed;

(ii) Ten years from the date the source begins to discharge process or other nonconstruction-related wastewater; or

(iii) The period of depreciation or amortization of the facility for the purposes of section 167 or 169 (or both) of the Internal Revenue Code of 1954.

(2) The protection from more stringent standards of performance afforded by paragraph (d)(1) of this section does not apply to:

(i) Additional or more stringent permit conditions which are not technology based; for example, conditions based on water quality standards, or toxic effluent standards or prohibitions under section 307(a) of CWA; or

(ii) Additional permit conditions in accordance with § 125.3 controlling toxic pollutants or hazardous substances which are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic pollutants or hazardous substances when control of these pollutants has been specifically identified as the method to control the toxic pollutants or hazardous substances.

(3) When an NPDES permit issued to a source with a "protection period" under paragraph (d)(1) of this section will expire on or after the expiration of the protection period, that permit shall require the owner or operator of the source to comply with the requirements of section 301 and any other then applicable requirements of CWA immediately upon the expiration of the protection period. No additional period for achieving compliance with these requirements shall be allowed except when necessary to achieve compliance with requirements promulgated less than 3 years before the expiration of the protection period.

(4) The owner or operator of a new source, a new discharger which commenced discharge after August 13, 1979, or a recommencing discharger shall install and have in operating condition, and shall "start-up" all pollution control equipment required to meet the conditions of its permit before beginning to discharge. Within the shortest feasible time (not to exceed 90 days), the owner or operator must meet all permit conditions.

(5) After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to operate the source in violation of those standards applicable to the source.

Appendix A to Part 122—NPDES Primary Industry Categories

Any permit issued after June 30, 1981 to dischargers in the following categories shall include effluent limitations and a compliance schedule to meet the requirements of section 301(b)(2) (A), (C), (D), (E) and (F) of CWA, whether or not applicable effluent limitations guidelines have been promulgated. See §§ 122.62 and 122.64.

Industry Category

Adhesives and Sealants
Aluminum Forming
Auto and Other Laundries
Battery Manufacturing
Coal Mining
Coil Coating
Copper Forming
Electrical and Electronic Components

Electroplating
Explosives Manufacturing
Foundries
Gum and Wood Chemicals
Inorganic Chemicals Manufacturing
Iron and Steel Manufacturing
Leather Tanning and Finishing
Mechanical Products Manufacturing
Nonferrous Metals Manufacturing
Ore Mining
Organic Chemicals Manufacturing
Paint and Ink Formulation
Pesticides
Petroleum Refining
Pharmaceutical Preparations
Photographic Equipment and Supplies
Plastics Processing
Plastic and Synthetic Materials Manufacturing
Porcelain Enameling
Printing and Publishing
Pulp and Paper Mills
Rubber Processing
Soap and Detergent Manufacturing
Steam Electric Power Plants
Textile Mills
Timber Products Processing

Appendix B to Part 122—Criteria for Determining a Concentrated Animal Feeding Operation (§ 122.54)

An animal feeding operation is a concentrated animal feeding operation for purposes of § 122.54 if either of the following criteria are met.

(a) More than the numbers of animals specified in any of the following categories are confined:

(1) 1,000 slaughter and feeder cattle,

(2) 700 mature dairy cattle (whether milked or dry cows),

(3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),

(4) 500 horses,

(5) 10,000 sheep or lambs,

(6) 55,000 turkeys,

(7) 100,000 laying hens or broilers (if the facility has continuous overflow watering),

(8) 30,000 laying hens or broilers (if the facility has a liquid manure handling system),

(9) 5,000 ducks, or

(10) 1,000 animal units; or

(b) More than the following number and types of animals are confined:

(1) 300 slaughter or feeder cattle,

(2) 200 mature dairy cattle (whether milked or dry cows),

(3) 750 swine each weighing over 25 kilograms (approximately 55 pounds),

(4) 150 horses,

(5) 3,000 sheep or lambs,

(6) 16,500 turkeys,

(7) 30,000 laying hens or broilers (if the facility has continuous overflow watering),

(8) 9,000 laying hens or broilers (if the facility has a liquid manure handling system),

(9) 1,500 ducks, or

(10) 300 animal units;

and either one of the following conditions are met: pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar manmade device; or pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25 year, 24-hour storm event.

The term "animal unit" means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.

The term "manmade" means constructed by man and used for the purpose of transporting wastes.

Appendix C to Part 122—Criteria for Determining a Concentrated Aquatic Animal Production Facility (§ 122.55)

A hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for purposes of § 122.55 if it contains, grows, or holds aquatic animals in either of the following categories.

(a) Cold water fish species or other cold water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year but does not include:

(1) Facilities which produce less than 9,090 harvest weight kilograms (approximately 20,000 pounds) of aquatic animals per year; and

(2) Facilities which feed less than 2,272 kilograms (approximately 5,000 pounds) of food during the calendar month of maximum feeding.

(b) Warm water fish species or other warm water aquatic animals in ponds, raceways, or other similar structures which discharge at least 30 days per year, but does not include:

(1) Closed ponds which discharge only during periods of excess runoff; or

(2) Facilities which produce less than 45,454 harvest weight kilograms (approximately 100,000 pounds) of aquatic animals per year.

"Cold water aquatic animals" include, but are not limited to, the *Salmonidae* family of fish; e.g., trout and salmon.

"Warm water aquatic animals" include, but are not limited to, the *Ameiuride*, *Centrarchidae* and *Cyprinidae* families of fish; e.g., respectively, catfish, sunfish and minnows.

Appendix D to Part 122—*NPDES Permit Application Testing Requirments (§ 122.53).*

Table I.—*Testing Requirements for Organic Toxic Pollutants by Industrial Category for Existing Dischargers*

Industrial category	GC/MS fraction [1]			
	Volatile	Acid	Base/neutral	Pesticide
Adhesives and Sealants	(2)	(2)	(2)	—
Aluminum Forming	(2)	(2)	(2)	—
Auto and Other Laundries	(2)	(2)	(2)	(2)
Battery Manufacturing	(2)	—	(2)	—
Coal Mining	(2)	(2)	(2)	(2)
Coil Coating	(2)	(2)	(2)	—
Copper Forming	(2)	(2)	(2)	—
Electric and Electronic Components	(2)	(2)	(2)	(2)
Electroplating	(2)	(2)	(2)	—
Explosives Manufacturing	—	(2)	(2)	—
Foundries	(2)	(2)	(2)	—
Gum and Wood Chemicals	(2)	(2)	(2)	(2)
Inorganic Chemicals Manufacturing	(2)	(2)	(2)	—
Iron and Steel Manufacturing	(2)	(2)	(2)	—
Leather Tanning and Finishing	(2)	(2)	(2)	(2)
Mechanical Products Manufacturing	(2)	(2)	(2)	—
Nonferrous Metals Manufacturing	(2)	(2)	(2)	(2)
Ore Mining	(2)	(2)	(2)	(2)
Organic Chemicals Manufacturing	(2)	(2)	(2)	(2)
Paint and Ink Formulation	(2)	(2)	(2)	(2)
Pesticides	(2)	(2)	(2)	(2)
Petroleum Refining	(2)	(2)	(2)	(2)
Pharmaceutical Preparations	(2)	(2)	(2)	—
Photographic Equipment and Supplies	(2)	(2)	(2)	(2)
Plastic and Synthetic Materials Manufacturing	(2)	(2)	(2)	(2)
Plastic Processing	(2)	—	—	—
Porcelain Enameling	(2)	—	(2)	(2)
Printing and Publishing	(2)	(2)	(2)	(2)
Pulp and Paper Mills	(2)	(2)	(2)	(2)
Rubber Processing	(2)	(2)	(2)	—
Soap and Detergent Manufacturing	(2)	(2)	(2)	—
Steam Electric Power Plants	(2)	(2)	(2)	—
Textile Mills	(2)	(2)	(2)	(2)
Timber Products Processing	(2)	(2)	(2)	(2)

[1] The toxic pollutants in each fraction are listed in Table II

[2] Testing required.

Table II *Organic Toxic Pollutants in Each of Four Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GC/MS).*

Volatiles

1V acrolein
2V acrylonitrile
3V benzene
4V bis (chloromethyl) ether
5V bromoform
6V carbon tetrachloride
7V chlorobenzene
8V chlorodibromomethane
9V chloroethane
10V 2-chloroethylvinyl ether
11V chloroform
12V dichlorobromomethane
13V dichlorodifluoromethane
14V 1,1-dichloroethane
15V 1,2-dichloroethane
16V 1,1-dichloroethylene
17V 1,2-dichloropropane
18V 1,2-dichloropropylene
19V ethylbenzene
20V methyl bromide
21V methyl chloride
22V methylene chloride
23V 1,1,2,2-tetrachloroethane
24V tetrachloroethylene
25V toluene
26V 1,2-trans-dichloroethylene
27V 1,1,1-trichloroethane
28V 1,1,2-trichloroethane
29V trichloroethylene
30V trichlorofluoromethane
31V vinyl chloride

Acid Compounds

1A 2-chlorophenol
2A 2,4-dichlorophenol
3A 2,4-dimethylphenol
4A 4,6-dinitro-o-cresol
5A 2,4-dinitrophenol
6A 2-nitrophenol
7A 4-nitrophenol
8A p-chloro-m-cresol
9A pentachlorophenol
10A phenol
11A 2,4,6-trichlorophenol

Base/Neutral

1B acenaphthene
2B acenaphthylene
3B anthracene
4B benzidine
5B benzo(a)anthracene
6B benzo(a)pyrene
7B 3,4-benzofluoranthene
8B benzo(ghi)perylene
9B benzo(k)fluoranthene
10B bis(2-chloroethoxy)methane
11B bis(2-chloroethyl)ether
12B bis(2-chloroisopropyl)ether
13B bis(2-ethylhexyl)phthalate
14B 4-bromophenyl phenyl ether
15B butylbenzyl phthalate
16B 2-chloronaphthalene
17B 4-chlorophenyl phenyl ether
18B chrysene
19B dibenzo(a,h)anthracene
20B 1,2-dichlorobenzene
21B 1,3-dichlorobenzene
22B 1,4-dichlorobenzene
23B 3,3'-dichlorobenzidine
24B diethyl phthalate
25B dimethyl phthalate
26B di-n-butyl phthalate
27B 2,4-dinitrotoluene
28B 2,6-dinitrotoluene
29B di-n-octyl phthalate
30B 1,2-diphenylhydrazine (as azobenzene)
31B fluoranthene
32B fluorene
33B hexachlorobenzene
34B hexachlorobutadiene
35B hexachlorocyclopentadiene
36B hexachloroethane
37B indeno(1,2,3-cd)pyrene
38B isophorone
39B naphthalene
40B nitrobenzene
41B N-nitrosodimethylamine
42B N-nitrosodi-n-propylamine
43B N-nitrosodiphenylamine
44B phenanthrene
45B pyrene
46B 1,2,4-trichlorobenzene

Pesticides

1P aldrin
2P α-BHC
3P β-BHC
4P γ-BHC
5P δ-BHC
6P chlordane
7P 4,4'-DDT
8P 4,4'-DDE
9P 4,4'-DDD
10P dieldrin
11P α-endosulfan
12P β-endosulfan
13P endosulfan sulfate
14P endrin
15P endrin aldehyde
16P heptachlor
17P heptachlor epoxide
18P PCB-1242
19P PCB-1254
20P PCB-1221
21P PCB-1232
22P PCB-1248
23P PCB-1260
24P PCB-1016
25P toxaphene

Table III *Other Toxic Pollutants: Metals, Cyanide, and Total Phenols.*

Antimony, Total
Arsenic, Total
Beryllium, Total
Cadmium, Total
Chromium, Total
Copper, Total
Lead, Total
Mercury, Total
Nickel, Total
Selenium, Total
Silver, Total
Thallium, Total
Zinc, Total
Cyanide, Total
Phenols, Total

Table IV *Conventional and Nonconventional Pollutants Required to be Tested by Existing Dischargers if Expected to be Present.*

Bromide
Chlorine, Total Residual
Color
Fecal Coliform
Fluoride
Nitrate-Nitrite
Nitrogen, Total Organic
Oil and Grease
Phosphorus, Total
Radioactivity
Sulfate
Sulfide
Sulfite
Surfactants
Aluminum, Total
Barium, Total
Boron, Total
Cobalt, Total
Iron, Total
Magnesium, Total
Molybdenum, Total
Manganese, Total
Tin, Total
Titanium, Total

Table V *Toxic Pollutants and Hazardous Substances Required to be Identified by Existing Dischargers if Expected to be Present.*

Toxic Pollutants

Asbestos

Hazardous Substances

Acetaldehyde
Allyl alcohol
Allyl chloride
Amyl acetate
Aniline
Benzonitrile
Benzyl chloride
Butyl acetate
Butylamine
Captan
Carbaryl
Carbofuran
Carbon disulfide
Chlorpyrifos
Coumaphos
Cresol
Crotonaldehyde
Cyclohexane
2,4-D (2,4-Dichlorophenoxy acetic acid)
Diazinon
Dicamba
Dichlobenil
Dichlone
2,2-Dichloropropionic acid
Dichlorvos
Diethyl amine
Dimethyl amine
Dintrobenzene
Diquat
Disulfoton
Diuron
Epichlorohydrin
Ethanolamine
Ethion
Ethylene diamine
Ethylene dibromide
Formaldehyde
Furfural
Guthion
Isoprene
Isopropanolamine
Kelthane
Kepone
Malathion
Mercaptodimethur
Methoxychlor
Methyl mercaptan
Methyl methacrylate
Methyl parathion
Mevinphos
Mexacarbate
Monoethyl amine
Monomethyl amine
Naled
Napthenic acid
Nitrotoluene
Parathion
Phenolsulfanate
Phosgene
Propargite
Propylene oxide
Pyrethrins
Quinoline
Resorcinol
Strontium
Strychnine
Styrene
2,4,5-T (2,4,5-Trichlorophenoxy acetic acid)
TDE (Tetrachlorodiphenylethane)
2,4,5-TP [2-(2,4,5-Trichlorophenoxy) propanoic acid]
Trichlorofon
Triethylamine
Trimethylamine
Uranium
Vanadium
Vinyl Acetate
Xylene
Xylenol
Zirconium

PART 123—STATE PROGRAM REQUIREMENTS

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Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.*

Subpart A—General Program Requirements

§ 123.1 Purpose and scope.

(a) This part specifies the procedures EPA will follow in approving, revising, and withdrawing State programs under the following statutes and the requirements State programs must meet to be approved by the Administrator under:

(1) Section 3006(b) (hazardous waste-final authorization) and section 3006(c) (hazardous waste-interim authorization) of RCRA;

(2) Section 1422 (underground injection control—UIC) of SDWA;

(3) Sections 318, 402, and 405 (National Pollutant Discharge Elimination System—NPDES) of CWA; and

(4) Section 404 (dredged or fill material) of CWA.

(b) Subpart A contains requirements applicable to all programs listed in paragraph (a) except hazardous waste programs operating under interim authorization. All requirements applicable to hazardous waste programs operating under interim authorization are contained in Subpart F. (References in this subpart to "programs under this Part" do not refer to hazardous waste programs operating under interim authorization.) Subpart A includes the elements which must be part of submissions to EPA for program approval, the substantive provisions which must be present in State programs for them to be approved, and the procedures EPA will follow in approving, revising, and withdrawing State programs. Subpart B contains additional requirements for States seeking final authorization under RCRA. Subpart C contains additional requirements for State UIC programs. Subpart D specifies additional requirements for State NPDES programs. Subpart E specifies additional requirements for State section 404 programs.

(c) State submissions for program approval must be made in accordance with the procedures set out in Subpart A and, in the case of State 404 programs with the procedures set out in Subpart E. (Submissions for interim authorization shall be made in accordance with Subpart F.) This includes developing and submitting to EPA a program description (§ 123.4), an Attorney General's statement (§ 123.5), a Memorandum of Agreement with the Regional Administrator (§ 123.6) and with the Secretary in the case of section 404 programs (§ 123.99).

(d) The substantive provisions which must be included in State programs for them to be approved include requirements for permitting, compliance evaluation, enforcement, public participation, and sharing of information. The requirements are found both in Subpart A (§§ 123.7 to 123.11) and in the program specific subparts. Many of the requirements for State programs are made applicable to States by cross-referencing other EPA regulations. In particular, many of the provisions of Parts 122 and 124 are made applicable to States by the references contained in § 123.7.

(e) Upon submission of a complete program, EPA will conduct a public hearing, if interest is shown, and determine whether to approve or disapprove the program taking into consideration the requirements of this Part, the appropriate Act and any comments received.

(f) The Administrator shall approve State programs which conform to the applicable requirements of this Part.

(g) Upon approval of a State program, the Administrator (or the Secretary in the case of section 404 programs) shall suspend the issuance of Federal permits for those activities subject to the approved State program.

(h) Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this Part.

(i) States are encouraged to consolidate their permitting activities. While approval of State programs under this Part will facilitate such consolidation, these regulations do not require consolidation. Each of the four programs under this Part may be applied for and approved separately.

(j) Partial State programs are not allowed under NPDES, 404, or RCRA (for programs operating under final authorization). However, in many cases States will lack authority to regulate activities on Indian lands. This lack of authority does not impair a State's ability to obtain full program approval in accordance with this Part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. Similarly, a State can assume primary enforcement responsibility for the UIC program, notwithstanding § 123.51(e), when the State program is unable to regulate activities on Indian lands within the State. EPA, or in the case of section 404 programs the Secretary, will administer the program on Indian lands if the State does not seek this authority.

[Note.—States are advised to contact the United States Department of the Interior, Bureau of Indian Affairs, concerning authority over Indian lands.]

(k) Except as provided in § 123.32, nothing in this Part precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this Part;

(2) Operating a program with a greater scope of coverage than that required under this Part. Where an approved State program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

[Note.—For example, when a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits. Also, State assumption of the section 404 program is limited to certain waters, as provided in § 123.91(c). The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill materials into those waters over which the Secretary retains section 404 jurisdiction.]

§ 123.2 Definitions.

The definitions in Part 122 apply to all subparts of this Part, including Subpart F.

§ 123.3 Elements of a program submission.

(a) Any State that seeks to administer a program under this Part shall submit to the Administrator at least three copies of a program submission. The submission shall contain the following:

(1) A letter from the Governor of the State requesting program approval;

(2) A complete program description, as required by § 123.4, describing how the State intends to carry out its responsibilities under this Part;

(3) An Attorney General's statement as required by § 123.5;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.6, and, in the case of State section 404 programs, a Memorandum of Agreement with the Secretary as required by § 123.99;

(5) Copies of all applicable State statutes and regulations, including those governing State administrative procedures;

(6) The showing required by § 123.39(c) (RCRA programs only) and § 123.54(b) (UIC programs only) of the State's public participation activities prior to program submission.

(b) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the statutory review period (i.e., the period of time allotted for formal EPA review of a proposed State program under the appropriate Act) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(c) If the State's submission is materially changed during the statutory review period, the statutory review period shall begin again upon receipt of the revised submission.

(d) The State and EPA may extend the statutory review period by agreement.

§ 123.4 Program description.

Any State that seeks to administer a program under this part shall submit a description of the program it proposes to administer in lieu of the Federal program under State law or under an interstate compact. The program description shall include:

(a) A description in narrative form of the scope, structure, coverage and processes of the State program.

(b) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program, including the information listed below. If more than one agency is responsible for administration of a program, each agency must have statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and an agency may be designated as a "lead agency" to facilitate communications between EPA and the State agencies having program responsibility. In the case of State RCRA programs, such a designation is mandatory (see paragraph (f)(4) of this section). When the State proposes to administer a program of greater scope of coverage than is required by Federal law, the information provided under this paragraph shall indicate the resources dedicated to administering the Federally required portion of the program.

(1) A description of the State agency staff who will carry out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(2) An itemization of the estimated costs of establishing and administering the program for the first two years after approval, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support, and cost of technical support.

(3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director for the first two years after approval to meet the costs listed in paragraph (b)(2) of this section, identifying any restrictions or limitations upon this funding.

(c) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.

(d) Copies of the permit form(s), application form(s), reporting form(s), and manifest format the State intends to employ in its program. Forms used by States need not be identical to the forms used by EPA but should require the same basic information, except that State NPDES programs are required to use standard Discharge Monitoring Reports (DMR). The State need not provide copies of uniform national forms it intends to use but should note its intention to use such forms. State section 404 application forms must include the information required by § 123.94 and State section 404 permit forms must include the information and conditions required by § 123.97.

[Note.—States are encouraged to use uniform national forms established by the

Administrator. If uniform national forms are used, they may be modified to include the State Agency's name, address, logo, and other similar information, as appropriate, in place of EPA's.]

(e) A complete description of the State's compliance tracking and enforcement program.

(f) *State RCRA programs only.* In the case of State RCRA programs, the program description shall also include:

(1) A description of the State manifest tracking system, and of the procedures the State will use to coordinate information with other approved State programs and the Federal program regarding interstate and international shipments.

(2) An estimate of the number of the following:

(i) Generators;

(ii) Transporters: and

(iii) On- and off-site storage, treatment and disposal facilities, and a brief description of the types of facilities and an indication of the permit status of these facilities.

(3) If available, an estimate of the annual quantities of hazardous wastes:

(i) Generated within the State;

(ii) Transporters; and

State; and

(iii) Stored, treated, or disposed of within the State:

(A) on-site; and

(B) off-site.

(4) When more than one agency within a State has responsibility for administering the State program, an identification of a "lead agency" and a description of how the State agencies will coordinate their activities.

(g) *State UIC programs only.* In the case of a submission for approval of a State UIC program the State's program description shall also include:

(1) A schedule for issuing permits within five years after program approval to all injection wells within the State which are required to have permits under this Part and Part 122;

(2) The priorities (according to criteria set forth in 40 CFR § 146.09) for issuing permits, including the number of permits in each class of injection well which will be issued each year during the first five years of program operation;

(3) A description of how the Director will implement the mechanical integrity testing requirements of 40 CFR § 146.08, including the frequency of testing that will be required and the number of tests that will be reviewed by the Director each year;

(4) A description of the procedure whereby the Director will notify owners and operators of injection wells of the requirement that they apply for and obtain a permit. The notification required by this paragraph shall require applications to be filed as soon as possible, but not later than four years after program approval for all injection wells requiring a permit;

(5) A description of any rule under which the Director proposes to authorize injections, including the text of the rule;

(6) For any existing enhanced recovery and hydrocarbon storage wells which the Director proposes to authorize by rule, a description of the procedure for reviewing the wells for compliance with applicable monitoring, reporting, construction, and financial responsibility requirements of §§ 122.41 and 122.42, and 40 CFR Part 146;

(7) A description of and schedule for the State's program to establish and maintain a current inventory of injection wells which must be permitted under State law;

(8) Where the Director has designated underground sources of drinking water in accordance with § 122.35(a), a description and identification of all such designated sources in the State;

(9) A description of aquifers, or parts thereof, which the Director has identified under § 122.35(b) as exempted aquifers, and a summary of supporting data;

(10) A description of and schedule for the State's program to ban Class IV wells prohibited under § 122.36; and

(11) A description of and schedule for the State's program to establish an inventory of Class V wells and to assess the need for a program to regulate Class V wells.

(h) *State 404 programs only.* In the case of a submission for approval of a section 404 program the State's program description shall also include:

(1) A description of State regulated waters.

[Note.—States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps of Engineers retains authority under section 404(g) of CWA.]

(2) A categorization, by type and quantity, of discharges within the State, and an estimate of the number of discharges within each category for which the discharger must file for a permit.

(3) An estimate of the number and percent of activities within each category for which the State has already issued a State permit regulating the discharge.

(4) In accordance with § 123.92(a)(6), a description of the specific best management practices requirements proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) of CWA for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

(5) A description of how the State section 404 agency(ies) will interact with other State and local agencies.

(6) A description of how the State will coordinate its enforcement strategy with that of the Corps of Engineers and EPA.

(7) Where more than one agency within a State has responsibility for administering the State program:

(i) A memorandum of understanding among all the responsible State agencies which establishes:

(A) Procedures for obtaining and exchanging information necessary for each agency to determine and assess the cumulative impacts of all activities authorized under the State program;

(B) Common reporting requirements; and

(C) Any other appropriate procedures not inconsistent with section 404 of CWA or these regulations;

(ii) A description of procedures for coordinating compliance monitoring and enforcement, distributing among the responsible agencies information received from applicants and permittees, and issuing reports required by section 404 of CWA or these regulations.

(8) Where several State 404 permits are required for a single project, a description of procedures for:

(i) Ensuring that all the necessary State 404 permits are issued before any of the permits go into effect; and

(ii) Concurrent processing and, where appropriate, joint processing of all of the necessary State 404 permits.

§ 123.5 Attorney General's statement.

(a) Any State that seeks to administer a program under this Part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel) that the laws of the State, or an interstate compact, provide adequate authority to carry out the program described under § 123.4 and to meet the requirements of this Part. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program.

[Note.—EPA will supply States with an Attorney General's statement format on request.]

(b) When a State seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

(c) *State NPDES programs only.* In the case of State NPDES programs, the Attorney General's statement shall certify that the State has adequate legal authority to issue and enforce general permits if the State seeks to implement the general permit program under § 122.59.

(d) *State section 404 programs only.*

(1) In the case of State section 404 programs the State Attorney General's statement shall contain an analysis of State law regarding the prohibition on taking private property without just compensation, including any applicable judicial interpretations, and an assessment of the effect such law will have on the successful implementation of the State's regulation of the discharge of dredged or fill material.

(2) In the case of State section 404 programs, where more than one agency has responsibility for administering the State program, the Attorney General's Statement shall include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State as a whole has full authority to administer a complete State section 404 program.

§ 123.6 Memorandum of Agreement with the Regional Administrator.

(a) Any State that seeks to administer a program under this Part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this Part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.

(b) The Memorandum of Agreement shall include the following:

(1) Provisions for the prompt transfer from EPA to the State of pending permit applications and any other information relevant to program operation not already in the possession of the State Director (e.g., support files for permit issuance, compliance reports, etc.). When existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

[Note.—For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would simultaneously be terminated.]

(2) Provisions specifying classes and categories of permit applications, draft permits, and proposed permits that the State will send to the Regional Administrator for review, comment and, where applicable, objection.

[Note.—The nature and basis of EPA review of State permits and permit applications differs among the programs governed by this Part. See §§ 123.38 (RCRA), 123.75 (NPDES) and 123.101 (404).]

(3) Provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports where appropriate. These procedures shall implement the requirements of § 123.74 (NPDES programs only) and § 123.100 (404 programs only).

(4) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and by EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(5) When appropriate, provisions for joint processing of permits by the State and EPA, for facilities or activities which require permits from both EPA and the State under different programs. See § 124.4.

[Note.—To promote efficiency and to avoid duplication and inconsistency, States are encouraged to enter into joint processing agreements with EPA for permit issuance. Likewise, States are encouraged (but not required) to consider steps to coordinate or consolidate their own permit programs and activities.]

(6) Provisions for modification of the Memorandum of Agreement in accordance with this Part.

(c) The Memorandum of Agreement, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this part. The State/EPA Agreement may not override the Memorandum of Agreement.

[Note.—Detailed program priorities and specific arrangements for EPA support of the State program will change and are therefore more appropriately negotiated in the context of annual agreements rather than in the MOA. However, it may still be appropriate to specify in the MOA the basis for such detailed agreements, e.g., a provision in the MOA specifying that EPA will select facilities in the State for inspection annually as part of the State/EPA agreement.]

(d) *State RCRA prorgrams only.* In the case of State RCRA programs the Memorandum of Agreement shall also provide that:

(1) EPA may conduct compliance inspections of all generators, transporters, and HWM facilities in each year for which the State is operating under final authorization. The Regional Administrator and the State Director may agree to limitations on compliance inspections of generators, transporters, and non-major HWM facilities.

(2) No limitations on EPA compliance inspections of generators, transporters, or non-major HWM facilities under paragraph (d)(1) of this section shall restrict EPA's right to inspect any generator, transporter, or HWM facility which it has cause to believe is not in compliance with RCRA; however, before conducting such an inspection, EPA will normally allow the State a reasonable opportunity to conduct a compliance evaluation inspection.

(3) The State Director shall promptly forward to EPA copies of draft permits and permit applications for all major HWM facilities for review and comment. The Regional Administrator and the State Director may agree to limitations regarding review of and comment on draft permits and/or permit applications for non-major HWM facilities. The State Director shall supply EPA copies of final permits for all major HWM facilities.

(4) The Regional Administrator shall promptly forward to the State Director information obtained prior to program approval in notifications provided under

section 3010(a) of RCRA. The Regional Administrator and the State Director shall agree on procedures for the assignment of EPA identification numbers for new generators, transporters, treatment, storage, and disposal facilities.

(5) The State Director shall review all permits issued under State law prior to the date of program approval and modify or revoke and reissue them to require compliance with the requirements of this Part. The Regional Administrator and the State Director shall establish a time within which this review must take place.

(e) *State NPDES programs only.* In the case of State NPDES programs the Memorandum of Agreement shall also specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under sections 402(d)(3), (e) or (f) of CWA. While the Regional Administrator and the State may agree to waive EPA review of certain "classes or categories" of permits, no waiver of review may be granted for the following discharges:

(1) Discharges into the territorial sea;

(2) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(3) Discharges proposed to be regulated by general permits (see § 122.59);

(4) Discharges from publicly owned treatment works with a daily average discharge exceeding 1 million gallons per day;

(5) Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day;

(6) Discharges from any major discharger or from any discharger within any of the 21 industrial categories listed in Appendix A to Part 122;

(7) Discharges from other sources with a daily average discharge exceeding 0.5 (one-half) million gallons per day, except that EPA review of permits for discharges of non-process wastewater may be waived regardless of flow.

(f) *State section 404 programs only.* (1) In the case of State section 404 programs, the Memorandum of Agreement with the Regional Administrator shall also specify:

(i) The categories (including any class, type, or size within such categories) of discharges for which EPA will waive review of State-issued permit applications, draft permits, and draft general permits. While the Regional Administrators and the State, after consultation with the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, may agree to waive Federal review of certain "classes or categories" of permits, no waiver may be granted for the following activities:

(A) Discharges which may affect the waters of a State other than the one in which the discharge originates;

(B) Major discharges;

(C) Discharges into critical areas established under State or Federal law including fish and wildlife sanctuaries or refuges, National and historical monuments, wilderness areas and preserves, National and State parks, components of the National Wild and Scenic Rivers system, the designated critical habitat of threatened or endangered species, and sites identified or proposed under the National Historic Preservation Act;

(D) Discharges proposed to be regulated by general permits; or

(E) Discharges known or suspected to contain toxic pollutants in toxic amounts under section 307(a)(1) of CWA or hazardous substances in reportable quantities under section 311 of CWA.

(ii) A definition of major discharges.

(2) In the case of State section 404 programs, where more than one agency within a State has responsibility for administering the program, all of the responsible agencies shall be parties to the Memorandum of Agreement.

(g) *State NPDES and Section 404 programs only.* Whenever a waiver is granted under paragraphs (e) or (f)(1) of this section, the Memorandum of Agreement shall contain:

(1) A statement that the Regional Administrator retains the right to terminate the waiver as to future permit actions, in whole or in part, at any time by sending the State Director written notice of termination; and

(2) A statement that the State shall supply EPA and, in the case of State section 404 programs, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Servcie (unless receipt is waived in writing), with copies of final permits.

§ 123.7 Requirements for permitting.

(a) All State programs under this Part must have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.4—(Application for a permit), except in the case of § 122.4(d) for State section 404 programs;

(2) § 122.6—(Signatories);

(3) § 122.7—(Applicable permit conditions);

(4) § 122.8—(Establishing permit conditions);

(5) § 122.9—(Duration);

(6) § 122.10(a)—(Schedules of compliance);

(7) § 122.11—(Monitoring requirements);

(8) § 122.13 (a) and (b)—(Effect of permit);

(9) § 122.14—(Permit transfer);

(10) § 122.15—(Permit modification);

(11) § 122.16—(Permit termination);

(12) § 122.18—(Noncompliance reporting);

(13) § 122.19 (b)-(d)—(Confidential information);

(14) § 124.3(a)—(Application for a permit);

(15) § 124.5 (a), (c), (d), and (f)—(Modification of permits), except as provided in § 123.100(b)(2) for State section 404 programs;

(16) § 124.6 (a), (c), (d), and (e)—(Draf permit), except as provided in § 123.100(b)(2) for State section 404 programs;

(17) § 124.8—(Fact sheets), except as provided in § 123.100(b)(2) for State section 404 programs;

(18) § 124.10 (a)(1)(ii), (a)(1)(iii), (a)(1)(v), (b), (c), (d), and (e)—(Public notice);

(19) § 124.11—(Public comments and requests for hearings);

(20) § 124.12(a)—(Public hearings); and

(21) § 124.17 (a) and (c)—(Response to comments).

[Note.—States need not implement provisions identical to the above listed provisions or the provisions listed in §§ 123.7 (b)-(d). Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions. While States may impose more stringent requirements, they may not make one requirement more lenient as a tradeoff for making another requirement more stringent; for example, by requiring that public hearings be held prior to issuing any permit while reducing the amount of advance notice of such a hearing.

State programs may, if they have adequate legal authority, implement any of the provisions of Parts 122 and 124. See, for example, § 122.5(d) (continuation of permits) and § 124.4 (consolidation of permit processing).

(b) *State RCRA programs only.* Any State hazardous waste program shall have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.21(d)(2)—(Specific inclusions);

(2) § 122.22—(Application for a permit);

(3) § 122.24—(Contents of Part A);

(4) § 122.25—(Contents of Part B);

[Note.—States need not use a two part permit application process. The State application process must, however, require information in sufficient detail to satisfy the requirements of §§ 122.24 and 122.25.]

(5) § 122.26—(Permit by rule);

(6) § 122.27—(Emergency permits);

(7) § 122.28—(Additional permit conditions);

(8) § 122.29—(Establishing permit conditions); and

(9) § 122.30—(Interim permits for UIC wells).

(c) *State UIC programs only.* State UIC programs shall have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.32—(Classification of injection wells);

(2) § 122.33—(Prohibition of unauthorized injection);

(3) § 122.34—(Prohibition of movement of fluids into underground sources of drinking water);

(4) § 122.35—(Identification of underground sources of drinking water and exempted aquifers);

(5) § 122.36—(Elimination of Class IV wells);

(6) § 122.37—(Authorization by rule);

(7) § 122.38—(Authorization by permit);

(8) § 122.39—(Area permits);

(9) § 122.41—(Additional permit conditions);

(10) § 122.42—(Establishing permit conditions);

(11) § 122.44—(Corrective action); and

(12) § 122.45—(Requirements for wells managing hazardous wastes).

(d) *State NPDES programs only.* State NPDES programs shall have legal authority to implement each of the following provisions and must be administered in conformance with each; except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

(1) § 122.52—(Prohibitions);

(2) § 122.53 (a), (d)–(g) and (i)–(k)—(Application for a permit);

(3) § 122.54—(Concentrated animal feeding operations);

(4) § 122.55—(Concentrated aquatic animal production facilities);

(5) § 122.56—(Aquaculture projects);

(6) § 122.57—(Separate storm sewers);

(7) § 122.58—(Silviculture);

(8) § 122.59—(General permits), *provided that* States which do not seek to implement the general permit program under § 122.59 need not do so;

(9) § 122.60—(Conditions applicable to all permits);

(10) § 122.61—(Conditions applicable to specified categories of permits);

(11) § 122.62—(Establishing permit conditions);

(12) § 122.63—(Calculating NPDES conditions);

(13) § 122.64—(Duration of permit);

(14) § 122.65—(Disposal into wells);

(15) § 124.56—(Fact sheets);

(16) § 124.57(a)—(Public notice);

(17) § 124.59—(Comments from government agencies);

(18) Subparts A, B, C, D, H, I, J, K and L of Part 125; and

(19) 40 CFR Parts 129, 133, and Subchapter N.

[Note.—For example, a State may impose more stringent requirements in an NPDES program by omitting the upset provision of § 122.60 or by requiring more prompt notice of an upset.]

(e) *State NPDES and 404 programs only.* (1) State NPDES and 404 permit programs shall have an approved continuing planning process under 40 CFR § 35.1500 and shall assure that the approved planning process is at all times consistent with CWA.

(2) State NPDES and 404 programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(i) For the purposes of this paragraph:

(A) "Board or body" includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(B) "Significant portion of income" means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(C) "Permit holders or applicants for a permit" does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(D) "Income" includes retirement benefits, consultant fees, and stock dividends.

(ii) For the purposes of this subparagraph, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

§ 123.8 Requirements for compliance evaluation programs.

(a) State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The State shall maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index, or inventory of such facilities and activities shall be made available to the Regional Administrator upon request;

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

(i) Determine compliance or noncompliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information;

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

(c) The State Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before entry conform with this requirement.

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court.

(e) *State NPDES programs only.* State NPDES compliance evaluation programs shall have procedures and ability for:

(1) Maintaining a comprehensive inventory of all sources covered by NPDES permits and a schedule of reports required to be submitted by permittees to the State agency;

(2) Initial screening (i.e., pre-enforcement evaluation) of all permit or grant-related compliance information to identify violations and to establish priorities for further substantive technical evaluation;

(3) When warranted, conducting a substantive technical evaluation following the initial screening of all permit or grant-related compliance information to determine the appropriate agency response;

(4) Maintaining a management information system which supports the compliance evaluation activities of this Part; and

(5) Inspecting the facilities of all major dischargers at least annually.

§ 123.9 Requirements for enforcement authority.

(a) Any State agency administering a program shall have available the following remedies for violations of State program requirements:

(1) To restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;

[Note.—This paragraph requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment.]

(2) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit;

(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows:

(i) *State RCRA programs only.* (A) Civil penalties shall be recoverable for any program violation in at least the amount of $10,000 per day.

(B) Criminal remedies shall be obtainable against any person who knowingly transports any hazardous waste to an unpermitted facility; who treats, stores, or disposes of hazardous waste without a permit; or who makes any false statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained, or used for purposes of program compliance. Criminal fines shall be recoverable in at least the amount of $10,000 per day for each violation, and imprisonment for at least six months shall be available.

(ii) *State UIC programs only.* (A) For all wells except Class II wells, civil penalties shall be recoverable for any program violation in at least the amount of $2,500 per day. For Class II wells, civil penalties shall be recoverable for any program violation in at least the amount of $1,000 per day.

(B) Criminal fines shall be recoverable in at least the amount of $5,000 per day against any person who willfully violates any program requirement, or, for Class II wells, pipeline (production) severance shall be imposable against any person who willfully violates any program requirement.

(iii) *State NPDES and section 404 programs only.* (A) Civil penalties shall be recoverable for the violation of any NPDES or section 404 permit condition; any NPDES or section 404 filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or any regulation or orders issued by the State Director. Such penalties shall be assessable in at least the amount of $5,000 per day for each violation.

(B) Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES or section 404 permit condition; or any NPDES or section 404 filing requirement. Such fines shall be assessable in at least the amount of $10,000 per day for each violation.

[Note.—States which provide criminal remedies based on "criminal negligence," "gross negligence" or strict liability satisfy the requirement of paragraph (a)(3)(iii)(B) of this section.]

(C) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES or section 404 form, in any notice or report required by an NPDES or section 404 permit, or who knowingly renders inaccurate any moitoring device or method required to be maintained by the Director. Such fines shall be recoverable in at least the amount of $5,000 for each instance of violation.

[Note.—In many States the State Director will be represented in State courts by the State Attorney General or other appropriate legal officer. Although the State Director need not appear in court actions he or she should have power to request that any of the above actions be brought.]

(b)(1) The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act.

[Note.—For example, this requirement is not met if State law includes mental state as an element of proof for civil violations.]

(c) Any civil penalty assessed, sought or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation. A civil penalty agreed upon by the State Director in settlement of administrative or judicial litigation may be adjusted by a percentage which represents the likelihood of success in establishing the underlying violation(s) in such litigation. If such civil penalty, together with the costs of expeditious compliance, would be so severely disproportionate to the resources of the violator as to jeopardize continuance in business, the payment of the penalty may be deferred or the penalty may be forgiven in whole or part, as circumstances warrant. In the case of a penalty for a failure to meet a statutory or final permit compliance deadline, "appropriate to the violation," as used in this paragraph, means a penalty which is equal to:

(1) An amount appropriate to redress the harm or risk to public health or the environment; plus

(2) An amount appropriate to remove the economic benefit gained or to be gained from delayed compliance; plus

(3) An amount appropriate as a penalty for the violator's degree of recalcitrance, defiance, or indifference to requirements of the law; plus

(4) An amount appropriate to recover unusual or extraordinary enforcement costs thrust upon the public; minus

(5) An amount, if any, appropriate to reflect any part of the noncompliance attributable to the government itself; and minus

(6) An amount appropriate to reflect any part of the noncompliance caused by factors completely beyond the violator's control (*e.g.*, floods, fires).

[**Note.**—In addition to the requirements of this paragraph, the State may have other enforcement remedies. The following enforcement options, while not mandatory, are highly recommended:

Procedures for assessment by the State of the costs of investigations, inspections, or monitoring surveys which lead to the establishment of violations;

Procedures which enable the State to assess or to sue any persons responsible for unauthorized activities for any expenses incurred by the State in removing, correcting, or terminating any adverse effects upon human health and the environment resulting from the unauthorized activity, whether or not accidental;

Procedures which enable the State to sue for compensation for any loss or destruction of wildlife, fish or aquatic life, or their habitat, and for any other damages caused by unauthorized activity, either to the State or to any residents of the State who are directly aggrieved by the unauthorized activity, or both; and

Procedures for the administrative assessment of penalties by the Director.]

(d) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a) (1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.8(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

§ 123.10 Sharing of information.

(a) Any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction. If the information has been submitted to the State under a claim of confidentiality, the State must submit that claim to EPA when providing information under this section. Any information obtained from a State and subject to a claim of confidentiality will be treated in accordance with the regulations in 40 CFR Part 2. If EPA obtains from a State information that is not claimed to be confidential, EPA may make that information available to the public without further notice.

(b) EPA shall furnish to States with approved programs the information in its files not submitted under a claim of confidentiality which the State needs to implement its approved program. EPA shall furnish to States with approved programs information submitted to EPA under a claim of confidentiality, which the State needs to implement its approved program, subject to the conditions in 40 CFR Part 2.

§ 123.11 Coordination with other programs.

(a) Issuance of State permits under this Part may be coordinated with issuance of RCRA, UIC, NPDES, and 404 permits whether they are controlled by the State, EPA, or the Corps of Engineers. See § 124.4.

(b) The State Director of any approved program which may affect the planning for and development of hazardous waste management facilities and practices shall consult and coordinate with agencies designated under section 4006(b) of RCRA (40 CFR Part 255) as responsible for the development and implementation of State solid waste management plans under section 4002(b) of RCRA (40 CFR Part 256).

§ 123.12 Approval process.

The process for EPA approval of State programs is set out in §§ 123.39 (RCRA), 123.54 (UIC), 123.77 (NPDES), and 123.104 (404).

§ 123.13 Procedures for revision of State programs.

(a) Either EPA or the approved State may initiate program revision. Program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities.

(b) Revision of a State program shall be accomplished as follows:

(1) The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary under the circumstances.

(2) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the **Federal Register** and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received.

(3) The Administrator shall approve or disapprove program revisions based on the requirements of this Part and of the appropriate Act.

(4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the **Federal Register.** Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

(c) States with approved programs shall notify EPA whenever they propose to transfer all or part of any program from the approved State agency to any other State agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until approved by the Administrator under paragraph (b) of this section. Organizational charts required under § 123.4(b) shall be revised and resubmitted.

(d) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as are necessary.

(e) *State RCRA programs only.* All new programs must comply with these regulations immediately upon approval. Any approved program which requires revision because of a modification to this Part or to 40 CFR Parts 122, 124, 260, 261, 262, 263, 264, 265 or 266 shall be so revised within one year of the date of promulgation of such regulation, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within two years.

(f) *State UIC programs only.* The State shall submit the information required under paragraph (b)(1) of this section within 270 days of any amendment to this Part or 40 CFR Parts 122, 124, or 146 which revises or adds any requirement respecting an approved State UIC program.

(g) *State NPDES programs only.* All new programs must comply with these regulations immediately upon approval. Any approved State section 402 permit program which requires revision to conform to this Part shall be so revised within one year of the date of promulgation of these regulations, unless a State must amend or enact a statute in order to make the required revision in which case such revision shall take place within 2 years, except that revision of State programs to implement the requirements of 40 CFR Part 403 (pretreatment) shall be accomplished as provided in 40 CFR § 403.10. In addition, approved States shall submit, within 6 months, copies of their permit forms for EPA review and approval. Approved States shall also assure that permit applicants, other than POTWs, either (1) whose permits expire after November 30, 1980 or (2) whose permits expire before November 30, 1980 and who have not reapplied for a permit prior to April 30, 1980, submit, as part of their application, the information required under §§ 122.4(d) and 122.53 (d) or (e), as appropriate.

(h) *State section 404 programs only.* The Regional Administrator shall consult with the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service regarding any substantial program revision, and shall consider their recommendations prior to approval of any such revision.

§ 123.14 Criteria for withdrawal of State programs.

(a) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this Part, and the State fails to take corrective action. Such circumstances include the following:

(1) When the State's legal authority no longer meets the requirements of this Part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this Part, including:

(i) Failure to exercise control over activities required to be regulated under this Part, including failure to issue permits;

(ii) Repeated issuance of permits which do not conform to the requirements of this Part; or

(iii) Failure to comply with the public participation requirements of this Part.

(3) When the State's enforcement program fails to comply with the requirements of this Part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 123.6.

§ 123.15 Procedures for withdrawal of State programs.

(a) A State with a program approved under this Part may voluntarily transfer program responsibilities required by Federal law to EPA (or to the Secretary in the case of 404 programs) by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator (and the Secretary in the case of section 404 programs) 180 days notice of the proposed transfer and shall submit a plan for the orderly transfer of all relevant program information not in the possession of EPA (or the Secretary in the case of section 404 programs) (such as permits, permit files, compliance files, reports, permit applications) which are necessary for EPA (or the Secretary in the case of section 404 programs) to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator (and the Secretary in the case of section 404 programs) shall evaluate the State's transfer plan and shall identify any additional information needed by the Federal government for program administration and/or identify any other deficiencies in the plan.

(3) At least 30 days before the transfer is to occur, the Administrator shall publish notice of the transfer in the **Federal Register** and in enough of the largest newspapers in the State to provide Statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA and State mailing lists.

(b) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program, other than a UIC program. The process for withdrawing approval of State UIC programs is set out in § 123.55.

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on his or her own initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this Part as set forth in § 123.14. The Administrator shall respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal investigation of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing and shall specify the allegations against the State which are to be considered at the hearing. Within 30 days the State shall admit or deny these allegations in a written answer. The party seeking withdrawal of the State's program shall have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definitions of "Act," "Administrative Law Judge," "Hearing," "Hearing Clerk," and "Presiding Officer" in 40 CFR § 22.03 apply in addition to the following:

(i) "Party" means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) "Person" means the Agency, the State and any individual or organization having an interest in the subject matter of the proceeding.

(iii) "Petitioner" means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.* The following provisions of 40 CFR Part 22 (Consolidated Rules of Practice) are applicable to proceedings under this paragraph:

(i) § 22.02—(use of number/gender);

(ii) § 22.04(c)—(authorities of Presiding Officer);

(iii) § 22.06—(filing/service of rulings and orders);

(iv) § 22.07(a) and (b)—*except that,* the time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator—(computation/extension of time);

(v) § 22.08—*however,* substitute "order commencing proceedings" for "complaint"—(Ex Parte contacts);

(vi) § 22.09—(examination of filed documents);

(vii) § 22.11(a), (c) and (d), *however,* motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is first published—(intervention);

(viii) § 22.16 *except that,* service shall be in accordance with paragraph (b)(4) of this section, the first sentence in § 22.16(c) shall be deleted, and, the word "recommended" shall be substituted for the word "initial" in § 22.16(c)—(motions);

(ix) § 22.19(a), (b) and (c)—(prehearing conference);

(x) § 22.22—(evidence);

(xi) § 22.23—(objections/offers of proof);

(xii) § 22.25—(filing the transcript); and

(xiii) § 22.26—(findings/conclusions).

(4) *Record of proceedings.* (i) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(ii) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 401 M Street, S.W., Washington, D.C. 20460;

(iii) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involve matters of substance;

(iv) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(v) A copy of each such submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(vi) Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service; and

(vii) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(5) *Participation by a person not a party.* A person who is not a party may, at the discretion of the Presiding Officer, be permitted to make a limited appearance by making an oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(6) *Rights of parties.* All parties to the proceeding may:

(i) Appear by counsel or other representative in all hearing and prehearing proceedings;

(ii) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision.* (i) Within 30 days after the filing of proposed findings and conclusions, and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator.* (i) Within 60 days after the certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the appropriate Act and regulations his decision shall constitute "final agency action" within the meaning of 5 U.S.C. §704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the appropriate Act and regulations he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the State fails to take appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S.C. § 704.

(c) Withdrawal of authorization under this section and the appropriate Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions by the State prior to withdrawal.

Subpart B—Additional Requirements for State Hazardous Waste Programs

§ 123.31 Purpose and scope.

(a) This Subpart specifies additional requirements a State program must meet in order to obtain final authorization under section 3006(b) of RCRA. All of the requirements a State program must meet in order to obtain interim authorization under section 3006(c) of RCRA are specified in Subpart F.

(b) States approved under this Subpart are authorized to administer and enforce their hazardous waste program in lieu of the Federal program.

(c) States may apply for final authorization at any time after the initial promulgation of Phase II. State programs under final authorization may not take effect until the effective date of Phase II.

(d) States operating under interim authorization may apply for and receive final authorization as specified in paragraph (c) of this section. Notwithstanding approval under Subpart F, such States must meet all the requirements of Subpart A and this subpart in order to qualify for final authorization.

(e) States need not have been approved under Subpart F in order to qualify for final authorization.

§ 123.32 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this Part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other

States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this Part, the State program shall be deemed inconsistent.

§ 123.33 Requirements for identification and listing of hazardous wastes.

The State program must control all the hazardous wastes controlled under 40 CFR Part 261 and must adopt a list of hazardous wastes and a set of characteristics for identifying hazardous wastes equivalent to those under 40 CFR Part 261.

§ 123.34 Requirements for generators of hazardous wastes.

(a) The State program must cover all generators covered by 40 CFR Part 262. States must require new generators to contact the State and obtain an EPA identification number before they perform any activity subject to regulation under the approved State hazardous waste program.

(b) The State shall have authority to require and shall require all generators to comply with reporting and recordkeeping requirements equivalent to those under 40 CFR §§ 262.40 and 262.41. States must require that generators keep these records at least 3 years.

(c) The State program must require that generators who accumulate hazardous wastes for short periods of time prior to shipment off-site do so in containers meeting DOT shipping requirements under 49 CFR Parts 173, 178 and 179 or accumulate such wastes in tanks in accordance with State storage standards authorized by EPA under the approved State program.

(d) The State program must require that generators comply with requirements that are equivalent to the requirements for the packaging, labeling, marking, and placarding of hazardous waste under 40 CFR §§ 262.30 to 262.33, and are consistent with relevant DOT regulations under 49 CFR Parts 172, 173, 178 and 179.

(e) The State program shall provide requirements respecting international shipments which are equivalent to those at 40 CFR § 262.50, except that advance notification of international shipments, as required by 40 CFR § 262.50(b)(1), shall be filed with the Administrator. The State may require that a copy of such advance notice be filed with the State Director, or may require equivalent reporting procedures.

[Note.—Such notices shall be mailed to Hazardous Waste Export, Division for Oceans and Regulatory Affairs (A-107), U.S. Environmental Protection Agency, Washington, D.C. 20460.]

(f) The State must require that all generators of hazardous waste who transport (or offer for transport) such hazardous waste off-site:

(1) Use a manifest system that ensures that interstate and intrastate shipments of hazardous waste are designated for delivery, and, in the case of intrastate shipments, are delivered to facilities that are authorized to operate under an approved State program or the Federal program;

(2) Initiate the manifest and designate on the manifest the storage, treatment, or disposal facility to which the waste is to be shipped;

(3) Ensure that all wastes offered for transport are accompanied by the manifest, except in the case of shipments by rail or water specified in 40 CFR §§ 262.23(c) and 263.20(e). The State program shall provide requirements for shipments by rail or water equivalent to those under 40 CFR §§ 262.23(c) and 263.20(e).

(4) Investigate instances where manifests have not been returned by the owner or operator of the designated facility and report such instances to the State in which the shipment originated.

(g) In the case of interstate shipments for which the manifest has not been returned, the State program must provide for notification to the State in which the facility designated on the manifest is located and to the State in which the shipment may have been delivered (or to EPA in the case of unauthorized States).

(h) The State must follow the Federal manifest format (40 CFR § 262.21) and may supplement the format to a limited extent subject to the consistency requirements of the Hazardous Materials Transportation Act (49 U.S.C. 1801 et seq.).

§ 123.35 Requirements for transporters of hazardous wastes.

(a) The State program must cover all transporters covered by 40 CFR Part 263. New transporters must be required to contact the State and obtain an EPA identification number from the State before they accept hazardous waste for transport.

(b) The State shall have the authority to require and shall require all transporters to comply with recordkeeping requirements equivalent to those found at 40 CFR § 263.22. States must require that records be kept at least 3 years.

(c) The State must require the transporter to carry the manifest during transport, except in the case of shipments by rail or water specified in 40 CFR § 263.20(e), and to deliver wastes only to the facility designated on the manifest. The State program shall provide requirements for shipments by rail or water equivalent to those under 40 CFR § 263.20(e).

(d) For hazardous wastes that are discharged in transit, the State program must require that transporters notify appropriate State, local, and Federal agencies of such discharges, and clean up such wastes, or take action so that such wastes do not present a hazard to human health or the environment. These requirements shall be equivalent to those found at 40 CFR §§ 263.30 and 263.31.

§ 123.36 Requirements for hazardous waste management facilities.

The State shall have standards for hazardous waste management facilities which are equivalent to 40 CFR Parts 264 and 266. These standards shall include:

(a) Technical standards for tanks, containers, waste piles, incineration, chemical, physical and biological treatment facilities, surface impoundments, landfills, and land treatment facilities;

(b) Financial responsibility during facility operation;

(c) Preparedness for and prevention of discharges or releases of hazardous waste; contingency plans and emergency procedures to be followed in the event of a discharge or release of hazardous waste;

(d) Closure and post-closure requirements including financial requirements to ensure that money will be available for closure and post-closure monitoring and maintenance;

(e) Groundwater monitoring;

(f) Security to prevent unauthorized access to the facility;

(g) Facility personnel training;

(h) Inspections, monitoring, recordkeeping, and reporting;

(i) Compliance with the manifest system, including the requirement that facility owners or operators return a signed copy of the manifest to the generator to certify delivery of the hazardous waste shipment;

(j) Other requirements to the extent that they are included in 40 CFR Parts 264 and 266.

§ 123.37 Requirements with respect to permits and permit applications.

(a) State law must require permits for owners and operators of all hazardous waste management facilities required to obtain a permit under 40 CFR Part 122 and prohibit the operation of any hazardous waste management facility without such a permit, *except that* States may, if adequate legal authority exists, authorize owners and operators of any facility which would qualify for interim status under the Federal program to remain in operation until a final decision is made on the permit application. Where State law authorizes such continued operation it shall require compliance by owners and operators of such facilities with standards at least as stringent as EPA's interim status standards at 40 CFR Part 265.

(b) The State must require all new HWM facilities to contact the State and obtain an EPA identification number before commencing treatment, storage, or disposal of hazardous waste.

(c) All permits issued by the State shall require compliance with the standards adopted by the State under § 123.36.

(d) All permits issued under State law prior to the date of approval of final authorization shall be reviewed by the State Director and modified or revoked and reissued to require compliance with the requirements of this Part.

§ 123.38 EPA review of State permits.

(a) The Regional Administrator may comment on permit applications and draft permits as provided in the Memorandum of Agreement under § 123.6.

(b) Where EPA indicates, in a comment, that issuance of the permit would be inconsistent with the approved State program, EPA shall include in the comment:

(1) A statement of the reasons for the comment (including the section of RCRA or regulations promulgated thereunder that support the comment); and

(2) The actions that should be taken by the State Director in order to address the comments (including the conditions which the permit would include if it were issued by the Regional Administrator).

(c) A copy of any comment shall be sent to the permit applicant by the Regional Administrator.

(d) The Regional Administrator shall withdraw such a comment when satisfied that the State has met or refuted his or her concerns.

(e) Under section 3008(a)(3) of RCRA, EPA may terminate a State-issued permit in accordance with the procedures of Part 124, Subpart E, or bring an enforcement action in accordance with the procedures of 40 CFR Part 22 in the case of a violation of a State program requirement. In exercising these authorities, EPA will observe the following conditions:

(1) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition of that permit.

(2) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the grounds that the permittee is not complying with a condition that the Regional Administrator in commenting on the permit application or draft permit stated was necessary to implement approved State program requirements, whether or not that condition was included in the final permit.

(3) The Regional Administrator may not take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit on the ground that the permittee is not complying with a condition necessary to implement approved State program requirements unless the Regional Administrator stated in commenting on the permit application or draft permit that that condition was necessary.

(4) The Regional Administrator may take action under section 7003 of RCRA against a permit holder at any time whether or not the permit holder is complying with permit conditions.

§ 123.39 Approval process.

(a) Prior to submitting an application to EPA for approval of a State program, the State shall issue public notice of its intent to seek program approval from EPA. This public notice shall:

(1) Be circulated in a manner calculated to attract the attention of interested persons including:

(i) Publication in enough of the largest newspapers in the State to attract statewide attention; and

(ii) Mailing to persons on the State agency mailing list and to any other persons whom the agency has reason to believe are interested;

(2) Indicate when and where the State's proposed submission may be reviewed by the public;

(3) Indicate the cost of obtaining a copy of the submission;

(4) Provide for a comment period of not less than 30 days during which time interested members of the public may express their views on the proposed program;

(5) Provide that a public hearing will be held by the State or EPA if sufficient public interest is shown or, alternatively, schedule such a public hearing. Any public hearing to be held by the State on its application for authorization shall be scheduled no earlier than 30 days after the notice of hearing is published;

(6) Briefly outline the fundamental aspects of the State program; and

(7) Identify a person that an interested member of the public may contact with any questions.

(b) If the proposed State program is substantially modified after the public comment period provided in paragraph (a)(4) of this section, the State shall, prior to submitting its program to the Administrator, provide an opportunity for further public comment in accordance with the procedures of paragraph (a) of this section, *provided* that the opportunity for further public comment may be limited to those portions of the State's application which have been changed since the prior public notice.

(c) After complying with the requirements of paragraphs (a) and (b) of this section the State may submit, in accordance with § 123.3, a proposed program to EPA for approval. Such formal submission may only be made after the date of promulgation of Phase II. The program submission shall include copies of all written comments received by the State, a transcript, recording, or summary of any public hearing which was held by the State, and a responsiveness summary which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and responds to these comments.

(d) Within 90 days from the date of receipt of a complete program submission for final authorization, the Administrator shall make a tentative determination as to whether or not he expects to grant authorization to the State program. If the Administrator indicates that he may not approve the State program he shall include a general statement of his areas of concern. The Administrator shall give notice of this tentative determination in the **Federal Register** and in accordance with paragraph (a)(1) of this section. Notice of the tentative determination of authorization shall also:

(1) Indicate that a public hearing will be held by EPA no earlier than 30 days after notice of the tentative determination of authorization. The notice may require persons wishing to present testimony to file a request with the Regional Administrator, who may cancel the public hearing if sufficient

public interest in a hearing is not expressed;

(2) Afford the public 30 days after the notice to comment on the State's submission and the tentative determination; and

(3) Note the availability of the State submission for inspection and copying by the public.

(e) Within 90 days of the notice given pursuant to paragraph (d) of this section, the Administrator shall make a final determination whether or not to approve the State's program, taking into account any comments submitted. The Administrator will grant final authorization only after the effective date of Phase II. The Administrator shall give notice of this final determination in the **Federal Register** and in acccordance with paragraph (a)(1) of this section. The notification shall include a concise statement of the reasons for this determination, and a response to significant comments received.

Subpart C—Additional Requirements for State UIC Programs

§ 123.51 Purpose and scope.

(a) This Subpart describes additional substantive and procedural requirements for State UIC programs authorized under section 1422 of SDWA.

(b) States shall submit to the Administrator a proposed State UIC program complying with § 123.3 of this Part within 270 days of the date of promulgation of these regulations. The Administrator may, for good cause, extend the date for submission of a proposed State UIC program for up to an additional 270 days.

(c) EPA will establish a UIC program in any State which does not comply with paragraph (b) of this section. EPA will continue to operate a UIC program in such a State until the State receives approval of a UIC program in accordance with the requirements of this Part.

[Note.—States which are authorized to administer the NPDES permit program under section 402 of CWA are encouraged to rely on existing statutory authority, to the extent possible, in developing a State UIC program. Section 402(b)(1)(D) of CWA requires that NPDES States have the authority "to issue permits which * * * control the disposal of pollutants into wells." In many instances, therefore, NPDES States will have existing statutory authority to regulate well disposal which satisfies the requirements of the UIC program. Note, however, that CWA excludes certain types of well injections from the definition of "pollutant." If the State's statutory authority contains a similar exclusion it may need to be modified to qualify for UIC program approval.]

(d) If a State can demonstrate to EPA's satisfaction that there are no underground injections within the State for one or more classes of injection wells (other than Class IV wells) subject to SDWA and that such injections cannot legally occur in the State until the State has developed an approved program for those classes of injections, the State need not submit a program to regulate those injections and a partial program may be approved. The demonstration of legal prohibition shall be made by either explicitly banning new injections of the class not covered by the State program or providing a certification from the State Attorney General that such new injections cannot legally occur until the State has developed an approved program for that class. The State shall submit a program to regulate both those classes of injections for which a demonstration is not made and Class IV wells.

(e) When a State UIC program is fully approved by EPA to regulate all classes of injections, the State assumes primary enforcement authority under section 1422(b)(3) of SDWA. EPA retains primary enforcement responsibility whenever the State program is disapproved in whole or in part. States which have partially approved programs have authority to enforce any violation of the approved portion of their program. EPA retains authority to enforce violations of State underground injection control programs, except that, when a State has a fully approved program, EPA will not take enforcement actions without providing prior notice to the State and otherwise complying with section 1423 of SDWA.

§ 123.52 Requirement to obtain a permit.

States may authorize certain well injections by rule rather than by permit. Any authorization by rule shall comply with § 122.37.

§ 123.53 Progress reports.

States shall submit to the Administrator 6 months after the date of promulgation of these regulations a report describing the State's progress in developing a UIC program. If the Administrator extends the time for submission of a UIC program an additional 270 days, pursuant to § 123.51(b), the State shall submit a second report six months after the first report is due. The Administrator may prescribe the manner and form of the report.

§ 123.54 Approval process.

(a) Prior to submitting an application to the Administrator for approval of a State UIC program, the State shall issue public notice of its intent to adopt a UIC program and to seek program approval from EPA. This public notice shall:

(1) Be circulated in a manner calculated to attract the attention of interested persons. Circulation of the public notice shall include publication in enough of the largest newspapers in the State to attract Statewide attention and mailing to persons on appropriate State mailing lists and to any other persons whom the agency has reason to believe are interested;

(2) Indicate when and where the State's proposed program submission may be reviewed by the public;

(3) Indicate the cost of obtaining a copy of the submission;

(4) Provide for a comment period of not less than 30 days during which interested persons may comment on the proposed UIC program;

(5) Schedule a public hearing on the State program for no less than 30 days after notice of the hearing is published;

(6) Briefly outline the fundamental aspects of the State UIC program; and

(7) Identify a person that an interested member of the public may contact for further information.

(b) After complying with the requirements of paragraph (a) of this section any State may submit a proposed UIC program under section 1422 of SDWA and § 123.3 of this Part to EPA for approval. Such a submission shall include a showing of compliance with paragraph (a) of this section, copies of all written comments received by the State, a transcript, recording or summary of any public hearing which was held by the State, and a responsiveness summary which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and responds to these comments. A copy of the responsiveness summary shall be sent to those who testified at the hearing, and others upon request.

(c) After determining that a State's submission for UIC program approval is complete the Administrator shall issue public notice of the submission in the **Federal Register** and in accordance with paragraph (a)(1) of this section. Such notice shall:

(1) Indicate that a public hearing will be held by EPA no earlier than 30 days after notice of the hearing. The notice may require persons wishing to present testimony to file a request with the Regional Administrator, who may cancel the public hearing if sufficient public interest in a hearing is not expressed;

(2) Afford the public 30 days after the notice to comment on the State's submission; and

(3) Note the availability of the State submission for inspection and copying by the public.

(d) Within 90 days of the receipt of a complete submission (as provided in § 123.3) or material amendment thereto, the Administrator shall by rule either fully approve, disapprove, or approve in part the State's UIC program taking into account any comments submitted. The Administrator shall give notice of this rule in the **Federal Register** and in accordance with paragraph (a)(1) of this section. If the Administrator determines not to approve the State program or to approve it only in part, the notice shall include a concise statement of the reasons for this determination. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains the Agency's response to these comments. The responsiveness summary shall be sent to those who testified at the public hearing, and to others upon request.

§ 123.55 Procedures for withdrawal of State UIC programs.

Approval of a State UIC program may be withdrawn and a Federal program established in its place where the Administrator determines, after holding a public hearing, that the State program is not in compliance with the requirements of SDWA and this Part.

(a) *Notice to State of Public Hearing.* If the Administrator has cause to believe that a State is not administering or enforcing its authorized program in compliance with the requirements of SDWA and this Part, he or she shall inform the State by registered mail of the specific areas of alleged noncompliance. If the State demonstrates to the Administrator within 30 days of such notification that the State program is in compliance, the Administrator shall take no further action toward withdrawal and shall so notify the State by registered mail.

(b) *Public Hearing.* If the State has not demonstrated its compliance to the satisfaction of the Administrator within 30 days after notification, the Administrator shall inform the State Director and schedule a public hearing to discuss withdrawal of the State program. Notice of such public hearing shall be published in the **Federal Register** and in enough of the largest newspapers in the State to attract statewide attention, and mailed to persons on appropriate State and EPA mailing lists. This hearing shall be convened not less than 60 days nor more than 75 days following the publication of the notice of the hearing. Notice of the hearing shall identify the Administrator's concerns. All interested persons shall be given opportunity to make written or oral presentations on the State's program at the public hearing.

(c) *Notice to State of Findings.* Wherein the Administrator finds after the public hearing that the State is not in compliance, he or she shall notify the State by registered mail of the specific deficiencies in the State program and of necessary remedial actions. Within 90 days of receipt of the above letter, the State shall either carry out the required remedial action or the Administrator shall withdraw program approval. If the State carries out the remedial action or, as a result of the hearing is found to be in compliance, the Administrator shall so notify the State by registered mail and conclude the withdrawal proceedings.

Subpart D—Additional Requirements for State NPDES Programs

§ 123.71 Purpose and scope.

(a) This subpart describes additional requirements for State NPDES programs under sections 318, 402 and 405 of CWA. A State NPDES program will not be approved by the Administrator under section 402 of CWA unless it has authority to control the discharges specified in sections 318 and 405(a) of CWA. Permit programs under sections 318 and 405 will not be approved independent of a section 402 permit program.

(b) These regulations are promulgated under the authority of sections 304(i) and 101(e) of CWA, and implement the requirements of those sections.

(c) No partial NPDES programs will be approved by EPA. The State program must prohibit (except as provided in § 122.51(c)(2)) all point source discharges of pollutants, all discharges into aquaculture projects, and all disposal of sewage sludge which results in any pollutant from such sludge entering into any waters of the United States within the State's jurisdiction, except as authorized by a permit in effect under the State program or under section 402 of CWA. NPDES authority may be shared by two or more State agencies but each agency must have Statewide jurisdiction over a class of activities or discharges. When more than one agency is responsible for issuing permits, each agency must make a submission meeting the requirements of § 123.3 before EPA will begin formal review.

(d) After program approval EPA shall retain jurisdiction over any permits (including general permits) which it has issued unless arrangements have been made with the State in the Memorandum of Agreement for the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals, modification requests, or variance requests; the conduct of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request or variance request is not finally resolved when the Federally issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved.

§ 123.72 Control of disposal of pollutants into wells.

State law must provide authority to issue permits to control the disposal of pollutants into wells. Such authority shall enable the State to protect the public health and welfare and to prevent the pollution of ground and surface waters by prohibiting well discharges or by issuing permits for such discharges with appropriate permit conditions. A program approved under section 1422 of SDWA satisfies the requirements of this section.

[Note.—States which are authorized to administer the NPDES permit program under section 402 of CWA are encouraged to rely on existing statutory authority, to the extent possible, in developing a State UIC program under section 1422 of SDWA. Section 402(b)(1)(D) of CWA requires that NPDES States have the authority "to issue permits which . . . control the disposal of pollutants into wells." In many instances, therefore, NPDES States will have existing statutory authority to regulate well disposal which satisfies the requirements of the UIC program. Note, however, that CWA excludes certain types of well injections from the definition of "pollutant." If the State's statutory authority contains a similar exclusion it may need to be modified to qualify for UIC program approval.]

§ 123.73 Receipt and use of Federal information.

Upon approving a State permit program, EPA shall send to the State agency administering the permit program any relevant information which was collected by EPA. The Memorandum of Agreement under § 123.6 shall provide for the following, in such manner as the State Director and the Regional Administrator shall agree:

(a) Prompt transmission to the State Director from the Regional Administrator of copies of any pending permit applications or any other relevant information collected before the approval of the State permit program and not already in the possession of the State Director. When existing permits are transferred to the State Director (e.g., for purposes of compliance monitoring, enforcement or reissuance), relevant information includes support files for permit issuance, compliance reports and records of enforcement actions.

(b) Procedures to ensure that the State Director will not issue a permit on the basis of any application received from the Regional Administrator which the Regional Administrator identifies as incomplete or otherwise deficient until the State Director receives information sufficient to correct the deficiency.

§ 123.74 Transmission of information to EPA.

(a) Each State agency administering a permit program shall transmit to the Regional Administrator copies of permit program forms and any other relevant information to the extent and in the manner agreed to by the State Director and the Regional Administrator in the Memorandum of Agreement and not inconsistent with this Part. Proposed permits shall be prepared by State agencies unless agreement to the contrary has been reached under § 123.75(j). The Memorandum of Agreement shall provide for the following:

(1) Prompt transmission to the Regional Administrator of a copy of all complete permit applications received by the State Director, except those for which permit review has been waived under § 123.6(e). The State shall supply EPA with copies of permit applications for which permit review has been waived whenever requested by EPA;

(2) Prompt transmission to the Regional Administrator of notice of every action taken by the State agency related to the consideration of any permit application or general permit, including a copy of each proposed or draft permit and any conditions, requirements, or documents which are related to the proposed or draft permit or which affect the authorization of the proposed permit, except those for which permit review has been waived under § 123.6(e). The State shall supply EPA with copies of notices for which permit review has been waived whenever requested by EPA; and

(3) Transmission to the Regional Administrator of a copy of every issued permit following issuance, along with any and all conditions, requirements, or documents which are related to or affect the authorization of the permit.

(b) The State shall transmit a copy of each draft general permit or proposed general permit, except those for separate storm sewers, to the EPA Deputy Assistant Administrator for Water Enforcement at the same time the draft general permit or proposed general permit is transmitted to the Regional Administrator under paragraph (a)(2) of this section.

(c) The State program shall provide for transmission by the State Director to EPA of:

(1) Notices from publicly owned treatment works under § 122.61(b) and 40 CFR Part 403, upon request of the Regional Administrator;

(2) A copy of any significant comments presented in writing pursuant to the public notice of a draft permit and a summary of any significant comments presented at any hearing on any draft permit, except those comments regarding permits for which permit review has been waived under § 123.6(e) and for which EPA has not otherwise requested receipt, if:

(i) The Regional Administrator requests this information; or

(ii) The proposed permit contains requirements significantly different from those contained in the tentative determination and draft permit; or

(iii) Significant comments objecting to the tentative determination and draft permit have been presented at the hearing or in writing pursuant to the public notice.

(d) Any State permit program shall keep such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of CWA or of this Part.

§ 123.75 EPA review of and objections to State permits.

(a)(1) The Memorandum of Agreement shall provide a period of time (up to 90 days from receipt of proposed permits) in which the Regional Administrator may make general comments upon, objections to, or recommendations with respect to proposed permits. EPA reserves the right to take 90 days to supply specific grounds for objection, notwithstanding any shorter period specified in the Memorandum of Agreement, when a general objection is field within the review period specified in the Memorandum of Agreement. The Regional Administrator shall send a copy of any comment, objection or recommendation to the permit applicant.

(2) In the case of general permits, EPA shall have 90 days from the date of receipt of the proposed general permit to comment upon, object to or make recommendations with respect to the proposed general permit, and is not bound by any shorter time limits set by the Memorandum of Agreement for general comments, objections or recommendations. The EPA Deputy Assistant Administrator for Water Enforcement may comment upon, object to, or make recommendations with respect to proposed general permits, except those for separate storm sewers, on EPA's behalf.

(b)(1) Within the period of time provided under the Memorandum of Agreement for making general comments upon, objections to or recommendations with respect to proposed permits, the Regional Administrator shall notify the State Director of any objection to issuance of a proposed permit (except as provided in paragraph (a)(2) of this section for proposed general permits). This notification shall set forth in writing the general nature of the objections.

(2) Within 90 days following receipt of a proposed permit to which he or she has objected under paragraph (b)(1) of this section, or in the case of general permits within 90 days after receipt of the proposed general permit, the Regional Administrator, or in the case of general permits other than for separate storm sewers, the Regional Administrator or the EPA Deputy Assistant Administrator for Water Enforcement, shall set forth in writing and transmit to the State Director:

(i) A statement of the reasons for the objection (including the section of CWA or regulations thereunder that support the objection), and

(ii) The actions that must be taken by the State Director to eliminate the objection (including the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator).

[Note.—Paragraphs (a) and (b) of this section, in effect, modify any existing agreement between EPA and the State which provides less than 90 days for EPA to supply the specific grounds for an objection. However, when an agreement provides for an EPA review period of less than 90 days, EPA must file a general objection, in accordance with paragraph (b)(1) of this section, within the time specified in the agreement. This general objection must be followed by a specific objection within the 90-day period. This modification to MOA's allows EPA to provide detailed information concerning acceptable permit conditions, as required by section 402(d) of CWA. To avoid possible confusion, MOA's should be changed to reflect this arrangement.]

(c) The Regional Administrator's objection to the issuance of a proposed permit must be based upon one or more of the following grounds:

(1) The permit fails to apply, or to ensure compliance with, any applicable requirement of this Part;

[**Note.**—For example, the Regional Administrator may object to a permit not requiring the achievement of required effluent limitations by applicable statutory deadlines.]

(2) In the case of a proposed permit for which notification to the Administrator is required under section 402(b)(5) of CWA, the written recommendations of an affected State have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate;

(3) The procedures followed in connection with formulation of the proposed permit failed in a material respect to comply with procedures required by CWA or by regulations thereunder or by the Memorandum of Agreement;

(4) Any finding made by the State Director in connection with the proposed permit misinterprets CWA or any guidelines or regulations under CWA, or misapplies them to the facts;

(5) Any provisions of the proposed permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information by the permittee are inadequate, in the judgment of the Regional Administrator, to assure compliance with permit conditions, including effluent standards and limitations required by CWA, by the guidelines and regulations issued under CWA, or by the proposed permit;

(6) In the case of any proposed permit with respect to which applicable effluent standards and limitations under sections 301, 302, 306, 307, 318, 403 and 405 of CWA have not yet been promulgated by the Agency, the proposed permit, in the judgment of the Regional Administrator, fails to carry out the provisions of CWA or of any regulations issued under CWA; the provisions of this subparagraph apply to determinations made pursuant to § 125.3(c)(2) in the absence of applicable guidelines and to best management practices under section 304(e) of CWA, which must be incorporated into permits as requirements under sections 301, 306, 307, 318, 403 or 405, as the case may be;

(7) Issuance of the proposed permit would in any other respect be outside the requirements of CWA, or regulations issued under CWA.

(d) Prior to notifying the State Director of an objection based upon any of the grounds set forth in paragraph (b) of this section, the Regional Administrator:

(1) Shall consider all data transmitted pursuant to § 123.74;

(2) May, if the information provided is inadequate to determine whether the proposed permit meets the guidelines and requirements of CWA, request the State Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record that the Regional Administrator determines are necessary for review. If this request is made within 30 days of receipt of the State submittal under § 123.74, it shall constitute an interim objection to the issuance of the permit, and the full period of time specified in the Memorandum of Agreement for the Regional Administrator's review shall recommence when the Regional Administrator has received such record or portions of the record; and

(3) May, in his or her discretion, and to the extent feasible within the period of time available under the Memorandum of Agreement, afford to interested persons an opportunity to comment on the basis for the objection;

(e) Within 90 days of receipt by the State Director of an objection by the Regional Administrator, the State or interstate agency or any interested person may request that a public hearing be held by the Regional Administrator on the objection. A public hearing in accordance with the procedures of §§ 124.12 (c) and (d) shall be held, and public notice provided in accordance with § 124.10, whenever requested by the State or the interstate agency which proposed the permit or if warranted by significant public interest based on requests received.

(f) A public hearing held under paragraph (e) of this section shall be conducted by the Regional Administrator, and, at the Regional Administrator's discretion, with the assistance of an EPA panel designated by the Regional Administrator, in an orderly and expeditious manner.

(g) Following the public hearing, the Regional Administrator shall reaffirm the original objection, modify the terms of the objection, or withdraw the objection, and shall notify the State of this decision.

(h)(1) If no public hearing is held under paragraph (e) of this section and the State does not resubmit a permit revised to meet the Regional Administrator's objection within 90 days of receipt of the objection, the Regional Administrator may issue the permit in accordance with Parts 121, 122, and 124 of this chapter and any other guidelines and requirements of CWA.

(2) If a public hearing is held under paragraph (e) of this section, the Regional Administrator does not withdraw the objection, and the State does not resubmit a permit revised to meet the Regional Administrator's objection or modified objection within 30 days of the date of the Regional Administrator's notification under paragraph (g) of this section, the Regional Administrator may issue the permit in accordance with Parts 121, 122, and 124 of this chapter and any other guidelines and requirements of CWA.

(3) Exclusive authority to issue the permit passes to EPA when the times set out in this paragraph expire.

(i) In the case of proposed general permits for discharges other than from separate storm sewers insert "or the EPA Deputy Assistant Administrator for Water Enforcement" after "Regional Administrator" whenever it appears in paragraphs (c)–(h) of this section.

(j) The Regional Administrator may agree, in the Memorandum of Agreement under § 123.6, to review draft permits rather than proposed permits. In such a case, a proposed permit need not be prepared by the State and transmitted to the Regional Administrator for review in accordance with this section unless the State proposes to issue a permit which differs from the draft permit reviewed by the Regional Administrator, the Regional Administrator has objected to the draft permit, or there is significant public comment.

§ 123.76 Prohibition.

State permit programs shall provide that no permit shall be issued when the Regional Administrator has objected in writing under § 123.75.

§ 123.77. Approval process.

(a) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the **Federal Register**, and in enough of the largest newspapers in the State to attract statewide attention, and shall mail notice to persons known to be interested in such matters, including all persons on appropriate State and EPA mailing lists and all permit holders and applicants within the State. The notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice is published in the **Federal Register**;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(b) Within 90 days of the receipt of a complete program submission under § 123.3 the Administrator shall approve or disapprove the program based on the requirements of this Part and of CWA and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received and explains the Agency's response to these comments.

(c) If the Administrator approves the State's program he or she shall notify the State and publish notice in the **Federal Register**. The Regional Administrator shall suspend the issuance of permits by EPA as of the date of program approval.

(d) If the Administrator disapproves the State program he or she shall notify the State of the reasons for disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

Subpart E—Additional Requirements for State Programs Under Section 404 of the Clean Water Act

§ 123.91 Purpose and scope.

(a) This Subpart describes additional requirements, both procedural and substantive, for State permit programs under section 404 of CWA (regulating discharges of dredged or fill material). Because EPA does not operate the section 404 program, the permit requirements in Parts 122 and 124 are relevant to section 404 programs only to the extent they are made applicable to State section 404 programs in § 123.7(a). Additional permit application and processing requirements applicable to State 404 programs are set out in this Subpart.

(b) The requirements for State section 404 programs are promulgated under the authority of sections 101(e) and 501(a) of CWA.

(c) No partial section 404 programs will be approved by EPA. Except as provided in § 123.92, the State program must regulate all discharges of dredged or fill material into State regulated waters. State section 404 programs are limited under section 404(g)(1) of CWA to coverage of such State regulated waters. See the definition of "State regulated waters" in § 122.3.

(d) Under section 404(h)(5) of CWA, States are entitled, after program approval, to administer and enforce general permits issued by the Secretary. If the State chooses not to administer and enforce these permits, the Secretary retains jurisdiction until they expire. If the Secretary has retained jurisdiction and if a permit appeal or modification request is not finally resolved when the Federally issued permit expires, the Secretary, upon agreement with the State, may continue to retain jurisdiction until the matter is resolved.

§ 123.92 Activities not requiring permits.

(a) Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under this subpart:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (a)(1)(iii) of this section.

(ii) To fall under this exemption, the activities specified in paragraph (a)(1)(i) of this section must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been coverted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit, whether or not it is part of an established farming, silviculture, or ranching operation.

(iii)(A) *Cultivating* means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality or yield.

(B) *Harvesting* means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(C)(*1*) *Minor Drainage* means:

(*i*) The discharge or dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. (Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit.);

(*ii*) The discharge of dredged or fill material for the purpose of installing ditching or other such water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(*iii*) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of CWA, and which are in established use for the production of rice, cranberries, or other wetland crop species;

[Note.—The provisions of paragraphs (a)(1)(iii)(C)(*1*)(*ii*) and (*iii*) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (*e.g.*, the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.]

(*iv*) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year of formation of such blockages in order to be eligible for exemption.

(*2*) Minor drainage in waters of the U.S. is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (*e.g.*, wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(D) *Plowing* means all forms of primary tillage, including moldboard, chisel, or wide-blade, plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. The term does not include the redistribution of spoil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing will never involve a discharge of dredged or fill material.

(E) *Seeding* means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches. A simple connection of an irrigation return or supply ditch to waters of the U.S. and related bank stabilization measures are included within this exemption. Where a trap, weir, groin, wall, jetty or other structure within waters of the U.S., which will result in significant discernable alterations to flow or circulation, is constructed as part of the connection, such construction requires a 404 permit.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a State has an approved program under section 208(b)(4) of CWA which meets the requirements of sections 208(b)(4) (B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. These BMPs which must be applied to satisfy this provision shall include those detailed BMPs described in the State's approved program description pursuant to the requirements of § 123.4(h)(4), and shall also include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the U.S. shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the U.S.;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained during and following construction to prevent erosion;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the U.S. shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(b) If any discharge of dredged or fill material resulting from the activities listed in paragraphs (a) (1)-(6) of this section contains any toxic pollutant listed under section 307 of CWA such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a permit under the State program.

(c) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1)–(6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation *may* be impaired by such alteration.

[Note.—For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill materials into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to effect such conversion. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.]

(d) Federal projects which qualify under the criteria contained in section 404(r) of CWA (Federal projects authorized by Congress where an EIS has been submitted to Congress prior to authorization or an appropriation) are exempt from State section 404 permit requirements, but may be subject to other State or Federal requirements.

§123.93 Prohibitions.

No permit shall be issued by the State Director in the following circumstances:

(a) When the conditions of the permit do not comply with the requirements of CWA, or regulations and guidelines implementing CWA, including the section 404(b)(1) environmental guidelines (40 CFR Part 230).

(b) When the Regional Administrator has objected to issuance of the permit under section 404(j) of CWA and the objection has not been resolved.

(c) When, in the judgment of the Secretary of the Army acting through the Chief of Engineers, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge.

(d) When the proposed discharge would be into a defined area for which specification as a disposal site has been prohibited, restricted, denied, or withdrawn by the Administrator under section 404(c) of CWA, and the discharge would fail to comply with the Administrator's actions under that authority.

§ 123.94 Permit application.

(a) *Publicity and preapplication consultation.* The State Director shall maintain a program to inform, to the extent possible, potential applicants for permits of the requirements of the State program and of the steps required to obtain permits for activities in State regulated waters. The State Director is encouraged to include preapplication consultation as part of this program to assist applicants in understanding the requirements of the environmental guidelines issued under section 404(b)(1) of CWA (40 CFR Part 230) and in fulfilling permit application requirements.

(b) *Application for permit.* Except when an activity is authorized by a general permit under § 123.95 or is exempt from the requirement to obtain a permit under § 123.92, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit an application to the State Director. State application forms are subject to EPA review and approval.

(c) *Content of Application.* A complete application shall include the following information:

(1) A complete description of the proposed activity including:

(i) Name, address, and phone number of the applicant; the names, addresses, and phone numbers of owners of properties adjacent to the site; and, if appropriate, the location and dimensions of adjacent structures;

(ii) A description of the source of the dredged or fill material and method of dredging used, if any; a description of the type, composition and quantity of the material; the proposed method of transportation and disposal of the material, including the type of equipment to be used; and the extent (in acres) of the area of waters of the United States to be filled or used for disposal;

(iii) The purpose and intended use of the proposed activity (including whether it is water-dependent); a description of the use of any structures to be erected on the fill; and a schedule for the proposed activity;

(iv) A list of the approvals required by other Federal, interstate, State and local agencies for the activity, including all approvals or denials received; and

(v) A vicinity map identifying the proposed disposal site and the local jurisdiction closest to the disposal site.

(2) Information about the disposal site needed to evaluate compliance with 40 CFR Part 230, including the following:

(i) A description of known alternatives to the proposed discharge, including alternative disposal sites, construction methods, methods of discharge, and reasons for rejecting the alternatives;

(ii) A description of special aquatic sites, public use areas, wildlife refuges, and public water supply intakes in the affected or adjacent areas that may require special protection or preservation;

(iii) Plants, fish, shellfish, and wildlife in the disposal site which may be dependent on water quality and quantity;

(iv) Uses of the disposal site which might affect human health and welfare; and

(v) A description of technologies or management practices by which the applicant proposes to minimize adverse environmental effects of the discharge. Guidelines for minimizing the adverse effects of discharges of dredged or fill material are found in 40 CFR Part 230.

[Note.—The State shall provide permit applicants with guidance, either through the application form or on an individual basis, regarding the level of detail of information and documentation required under this paragraph. The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of presence of long-lived toxic chemical substances, and degree of environmental degradation.]

(3) One original set of drawings and maps, or one set of drawings and maps of reproducible quality, including:

(i) A map showing the following in plan view:

(A) Location of the activity site including latitude, longitude, and river mile, if known;

(B) Name of waterway;

(C) All applicable political (*e.g.*, county, borough, town, city, etc.) boundary lines;

(D) Names of all major roads in the vicinity of the site including the road providing the closest practicable access to the site;

(E) North arrow;

(F) Arrows showing flow and circulation patterns;

(G) Existing shorelines or ordinary high watermark;

(H) Location of known wetlands;

(I) Water depths and bottom configuration around the project;

(J) Delineation of disposal site;

(K) Size-relationship between the proposed disposal site and affected waters (*e.g.*, a ¼ acre fill in a 15-acre wetland);

(L) Location of previously used dredged material disposal sites with remaining capacity in the vicinity of the project. The map must indicate retention levees, weirs, and any other devices for retaining dredged or fill materials; and

(M) Location of structures, if any, in waters of the United States immediately adjacent to the proposed activity, including permit numbers, if known. Identify purposes of all structures.

(ii) A cross-sectional view of the proposed project showing the following:

(A) Water elevations;

(B) Water depths at waterward face of proposed work, or if dredging is proposed, showing dredging grade;

(C) Cross-section of fill;

(D) Elevation of spoil areas;

(E) Location of wetlands; and

(F) Delineation of disposal site.

(iii) Notes on all maps or drawings submitted, including:

(A) A list of names of adjacent property owners whose property also adjoins the water and who are not shown in the plan view;

(B) A title block for each sheet submitted identifying the proposed activity and containing the name of the body of water; river mile, if applicable; name of county, State and nearest incorporated municipality; name of applicant; number of the sheet and the total number of sheets in set; and date the drawing was prepared; and

(C) Graphic or numerical scale.

§ 123.95 General permits.

(a) *Coverage.* The State Director may issue a general permit for similar activities as specified in paragraph (b)(1) of this section within a defined geographic area as specified in paragraph (b)(2) of this section, if he or she determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

(b) *Conditions.* In addition to §§ 122.7 and 123.97, and the applicable requirements of § 123.98, each general permit shall contain conditions as follows:

(1) *Activities:* A specific description of the type(s) of activities which are authorized, including limitations for any single operation, to ensure that the requirements of paragraph (a) of this section are satisfied. At a minimum, these limitations shall include:

(i) The maximum quantity of material that may be discharged;

(ii) The type(s) of material that may be discharged;

(iii) The depth of fill permitted;

(iv) The maximum extent to which an area may be modified; and

(v) The size and type of structures that may be constructed.

(2) *Area:* A precise description of the geographic area to which the general permit applies, including, when appropriate, limitations on the types of waters or wetlands where operations may be conducted, to ensure that the requirements of paragraph (a) of this section are satisfied.

(3) *Notice:* The permit shall contain a requirement that no activity is authorized under the general permit unless the Director receives notice at least 30 days in advance of the date when the proposed activity is to commence. The Director may require any information in the notice necessary to determine whether the conditions of the general permit will be satisfied. If within 15 days of the date of submission of the notice the owner or operator has not been informed by the State Director of his or her intent to require an individual permit application, the owner or operator may commence operations under the general permit.

(c) *Requiring an individual permit.*

(1) Upon receiving notice under paragraph (b)(3) of this section, the State Director may require, at his discretion, that the owner or operator apply for an individual permit. Cases where an individual permit may be required include:

(i) The activity has more than a minimal adverse environmental effect;

(ii) The cumulative effects on the environment of the authorized activities are more than minimal; or

(iii) The discharger is not in compliance with the conditions of the general permit.

(2) When the State Director notifies the owner or operator within 15 days of receipt of notice under paragraph (b)(3) of this section that an individual permit application is required for that activity, the activity shall not be authorized by the general permit.

(3) The Director may require any person authorized under a general permit to apply for an individual permit.

§ 123.96 Emergency permits.

(a) *Coverage.* Notwithstanding any other provision of this Part or Part 124, the State Director may temporarily permit a specific dredge or fill activity if:

(1) An unacceptable hazard to life or severe loss of property will occur if an emergency permit is not granted; and

(2) The anticipated threat or loss may occur before a permit can be issued or modified under the procedures otherwise required by this Part and Part 124.

(b) *Requirements for issuance.* (1) The emergency permit shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of §§ 122.7, 123.97 and 123.98.

(2) Any emergency permit shall be limited in duration to the time required to complete the authorized emergency action, not to exceed 90 days.

(3) The emergency permit must have a condition requiring restoration of the disposal site (for example, removal of fill, steps to prevent erosion). If more than 90 days from issuance is necessary to complete restoration, the permit may be extended for this purpose only.

(4) The emergency permit may be oral or written. If oral, it must be followed within five days by a written emergency permit.

(5) Notice of the emergency permit shall be published and public comments received in accordance with applicable requirements of §§ 124.10 and 124.11 as soon as possible but no later than 10 days after the issuance date.

(6) The emergency permit may be terminated at any time without process if the State Director determines that termination is appropriate to protect human health or the environment.

§ 123.97 Additional conditions applicable to all 404 permits.

The following conditions, in addition to those set forth in § 122.7, apply to all 404 permits:

(a) The permittee need not comply with the conditions of this permit to the extent and for the duration that such noncompliance is authorized in an emergency permit. (See § 123.96.)

(b) Activities are not conducted under the authority of this permit if they are not specifically identified and authorized in this permit.

(c) The permittee shall maintain the authorized work area in good condition and in accordance with the requirements contained in this permit.

(d) If any applicable water quality standards are revised or modified, or if a toxic effluent standard or prohibition under CWA section 307(a) is established for a pollutant present in the permittee's discharge and is more stringent than any limitation in the permit, the permit shall be promptly modified to conform to the standard, limitation or prohibition.

§ 123.98 Establishing 404 permit conditions.

In addition to the conditions established under § 122.8(a), each 404 permit shall include conditions meeting the following requirements, when applicable:

(a) *Identification.* A specific identification and description of the authorized activity, including:

(1) The name and address of the permittee and the permit application identification number;

(2) The use or purpose of the discharge;

(3) The type and quantity of the materials to be discharged;

(4) Any structures proposed to be erected on fill material; and

(5) The location and boundaries of the discharge site(s), including a detailed sketch and the name and a description of affected State regulated waters.

(b) *Environmental guidelines.* Provisions ensuring that the discharge will be conducted in compliance with the environmental guidelines issued under section 404(b)(1) of CWA (40 CFR Part 230), including conditions to ensure that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.

(c) *Water quality standards.* Any requirements necessary to comply with water quality standards established under applicable Federal or State law. If an applicable water quality standard is promulgated after the permit is issued, it shall be modified as provided in § 123.97(d).

(d) *Toxic effluent guidelines or prohibitions.* Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of CWA or applicable State or local law. If an applicable toxic effluent standard or prohibition is promulgated after the permit is issued, it shall be modified as provided in § 123.97(d).

(e) *Best Management Practices.* Applicable BMPs approved by a Statewide CWA section 208(b)(4) agency as provided in the agreement described in § 123.102(a)(1).

(f) *General permits.* Any conditions necessary for general permits as required under § 123.95.

(g) *Commencement of work.* A specific date on whfch the permit shall automatically expire, unless previously revoked and reissued or modified or continued, if the authorized work has not been commenced.

§ 123.99 Memorandum of Agreement with the Secretary.

Before a State program is approved under this Part, the State shall enter into a Memorandum of Agreement with the Secretary. Where more than one agency within a State has responsibility for administering the State program, all of the responsible agencies shall be parties to the Memorandum of Agreement. The Memorandum of Agreement shall include:

(a) A description of State regulated waters, as identified by the Secretary.

(b) Where an agreement is reached, procedures for joint processing of permits for activities which require both a section 404 permit from the State and a section 9 or 10 permit from the Secretary under the Rivers and Harbors Act of 1899, provided such procedures satisfy the requirements of this Part.

(c) An identification of those general permits, if any, issued by the Secretary, the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program and a plan for transferring responsibility for these permits to the State, including procedures for the prompt transmission from the Secretary to the State Director of relevant information not already in the possession of the State Director including support files for permit issuance, compliance reports and records of enforcement actions. In many instances States will lack the authority to directly administer permits issued by the Federal government. However, procedures authorized under State law may be established to transfer responsibility for these permits.

(d) Procedures whereby the Secretary will, upon program approval, transfer to the State pending section 404 permit applications and other relevant information, not already in the possession of the State Director.

(e) Procedures to ensure that the State Director will not issue a permit on the basis of any application received from the Secretary which the Secretary has identified as incomplete or otherwise deficient until the State Director receives information sufficient to correct the deficiency.

(f) A provision that the State shall not issue any section 404 permit for a discharge which, in the judgment of the Secretary after consultation with the Secretary of the Department in which the Coast Guard is operating, would substantially impair anchorage or navigation.

(g) Those classes or categories, if any, of proposed State permits for which the Secretary waives the right to review.

(h) Other matters not inconsistent with this Part that the Secretary and the State deem appropriate.

[Note.—For example, where a State permit program includes coverage of those traditionally navigable waters in which only *the Secretary may issue section 404 permits* (by virtue of section 404(g)(1) of CWA), the State is strongly encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.]

§ 123.100 Transmission of information to EPA and other Federal agencies.

(a) The Memorandum of Agreement under § 123.6 shall provide for the following:

(1) Prompt transmission to the Regional Administrator (by certified mail) and to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of all complete permit applications received by the State Director, except those for which permit review has been waived under § 123.6(f)(1)(i). The State shall supply EPA, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service with copies of permit applications for which permit reivew has been waived whenever requested by such agencies. Where State law requires preparation of an environmental impact statement (EIS) or similar document, and such EIS or other document is available, the EIS or other document shall accompany the permit application when transmitted to the Regional Administrator.

(2) Prompt transmission to the Regional Administrator (by certified mail) and to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of notice of every action taken by the State agency related to the consideration of any permit application, including a copy of each draft permit prepared, and any conditions, requirements, or documents which are related to the draft permit or which affect the authorization of the draft permit. A draft permit shall be prepared by the State and transmitted to EPA:

(i) At the time of transmission of the complete permit application, for discharges listed in § 123.6(f)(1)(i)(A)–(E);

(ii) Upon request of EPA in accordance with § 123.101(e)(3), for discharges not listed in § 123.6(f)(1)(i)(A)–(E), unless EPA has waived review under § 123.6(f)(1)(i).

(3) Prompt transmission to the Regional Administrator, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of each draft general permit. A draft general permit shall be prepared by the State whenever the State intends to issue a general permit.

(4) Transmission to the Regional Administrator, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service of a copy of every issued permit following issuance, along with any and all conditions and requirements.

(b)(1) State section 404 programs shall comply with the draft permit requirements of §§ 124.6 (a), (c), (d), and (e) and 124.8 for those discharges which require a draft permit under paragraph (a)(2) of this section and for those discharges to be regulated by general permits. For discharges which require a draft permit under paragraph (a)(2) of this section, public review and EPA review, under § 123.101, shall be based on the permit application and the draft permit. For discharges to be regulated by general permits, public review and EPA review shall be based on the draft general permit.

(2) For all other discharges, public review and EPA review, if not waived under § 123.6(f)(1)(i), shall be based on the permit application. For these discharges, States need not comply with §§ 124.6 (a), (c), (d), and (e) or 124.8.

§ 123.101 EPA review of and objections to State permits.

(a) The Memorandum of Agreement shall provide that the Regional Administrator may comment upon, object to, or make recommendations with respect to permit applications, draft permits (if prepared under § 123.100), or draft general permits within 90 days of receipt. If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft permit, or draft general permit, he or she shall notify the State Director of his or her intent within 30 days of receipt. The Regional Administrator may notify the State within 30 days of receipt that there is no comment but reserve the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing. The Regional Administrator shall send a copy of any comment, objection, or recommendation to the permit applicant.

(b) Within 90 days following receipt of a permit application, draft permit or draft general permit for which the Regional Administrator has provided notification under paragraph (a) of this section, the Regional Administrator may object to permit issuance. In order to object, the Regional Administrator shall set forth in writing and transmit to the State Director:

(1) A statement of the reason(s) for the objection (including the section of CWA or regulations thereunder that support the objection); and

(2) The actions that must be taken by the State Director in order to eliminate the objection (including the conditions which the permit would include if it were issued by the Regional Administrator).

(c) When the State Director has received an objection to a permit application, draft permit, or draft general permit under this section and has taken the steps required by the Regional Administrator to eliminate the objection, a revised permit shall be prepared and transmitted to the Regional Administrator for review. If no further objection is received from the Regional Administrator within 15 days of the receipt of the revised permit, the Director may issue the permit.

(d) Any objection under this section must be based upon one or more of the following grounds:

(1) The permit application, draft permit, or draft general permit fails to apply, or to ensure compliance with, any applicable requirement of this Part;

(2) In the case of any permit application for which notification to the Administrator is required under section 404(h)(1)(E) of CWA, the written recommendations of an affected State have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate (see § 123.102(c));

(3) The procedures followed in connection with processing the permit failed in a material respect to comply with procedures required by CWA, by this Part, by other regulations and guidelines thereunder, or by the Memorandum of Agreement;

(4) Any finding made by the State Director in connection with the draft permit or draft general permit misinterprets CWA or any guidelines or regulations thereunder, or misapplies them to the facts;

(5) Any provisions of the permit application, draft permit, or draft general permit relating to the maintenance of records, reporting, monitoring, sampling, or the provision of any other information by the permittee are inadequate, in the judgment of the Regional Administrator, to assure compliance with permit conditions including water quality standards, required by CWA, by 40 CFR Part 230, or by the draft permit or draft general permit;

(6) The information contained in the permit application is insufficient to judge compliance with 40 CFR Part 230; or

(7) Issuance of a permit would in any other respect be outside the requirements of section 404 of CWA, or regulations implementing section 404 of CWA.

(e) Prior to notifying the State Director of an objection based upon any of the grounds set forth in paragraph (d) of this section, the Regional Administrator:

(1) Shall consider all data transmitted pursuant to §§ 123.100 and 123.102.

(2) Shall, if the information provided is inadequate to determine whether the permit application, draft permit, or draft general permit meets the guidelines and requirements of CWA, request the State Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record, or other information, including a supplemented application, that the Regional Administrator determines are necessary for review. This request shall be made within 30 days of receipt of the State submittal under § 123.100. It shall constitute an interim objection to the issuance of the permit, and the period of time specified in the Memorandum of Agreement for the Regional Administrator's review shall be suspended from the date of the request and shall resume when the Regional Administrator has received such record or other information requested.

(3) May, in the case of discharges for which a draft permit is not automatically required under § 123.100(a)(2)(i), request within 30 days of receipt of the permit application that the State Director prepare a draft permit under § 123.100(a)(2)(ii). The draft permit shall be submitted to EPA and other Federal agencies, as required under § 123.100(a)(2). When a draft permit is prepared under this subparagraph, Federal and public review shall recommence under § 123.100(b)(1). The Regional Administrator's period for review shall begin upon receipt of the draft permit.

[Note.—It is anticipated that draft permits will be requested only in exceptional and/or complex cases.]

(4) May, at his or her discretion, and to the extent feasible within the period of time available under the Memorandum of Agreement, afford to interested persons an opportunity to comment on the basis for the objection.

(f) Within 90 days of receipt by the State Director of an objection by the Regional Administrator, the State or any interested person may request that a public hearing be held by the Regional Administrator on the objection. A public hearing in accordance with the procedures of §§ 124.12 (c) and (d) shall be held, and public notice provided in accordance with § 124.10, whenever requested by the State issuing the permit, or if warranted by significant public interest based on requests received.

(g) A public hearing held under paragraph (f) of this section shall be conducted by the Regional

Administrator, and, at the Regional Administrator's discretion, with the assistance of an EPA panel designated by the Regional Administrator, in an orderly and expeditious manner.

(h) Following the public hearing the Regional Administrator shall reaffirm the original objection, modify the terms of the objection, or withdraw the objection, and shall notify the State of this decision.

(i)(1) If no public hearing is held under paragraph (f) of this section and the State does not resubmit a permit revised to meet the Regional Administrator's objection or notify EPA of its intent to deny the permit within 90 days of receipt of the objection, the Secretary may issue the permit in accordance with the guidelines and regulations of CWA.

(2) If a public hearing is held under paragraph (f) of this section, the Regional Administrator does not withdraw the objection, and the State does not resubmit a permit revised to meet the Regional Administrator's objection or modified objection or notify EPA of its intent to deny the permit within 30 days of the date of the Regional Administrator's notification under paragraph (h) of this section, the Secretary may issue the permit in accordance with the guidelines and regulations of CWA.

§ 123.102 Coordination requirements.

(a) *General coordination.* (1) If the State has a Statewide CWA section 208(b)(4) regulatory program, the State Director shall develop an agreement with the agency designated to administer such program. The agreement shall include:

(i) A definition of the activities to be regulated by each program;

(ii) Arrangements providing the agencies an opportunity to comment on prospective permits, BMPs, and other relevant actions; and

(iii) Arrangements incorporating BMPs developed by the section 208(b)(4) program into section 404 permits, where appropriate.

(2) Where a CWA section 208(b)(4) program has been approved under section 208(b)(4)(C), no permit shall be required for activities for which the Administrator has approved BMPs under such approved program except as provided in §§ 123.92 (b) and (c). Until such section 208(b)(4) program has been approved by the Administrator, a person proposing to discharge must obtain an individual permit or comply with a general permit.

(3) The State Director shall consult with any State agency(ies) with jurisdiction over fish and wildlife resources.

(b) *Coordination with other Federal and Federal-State review processes.* State section 404 programs shall assure coordination of State section 404 permits with Federal and Federal-State water related planning and review processes.

(1) The State Director shall assure that the impact of proposed discharges will be consistent with the Wild and Scenic Rivers Act when the proposed discharge could affect portions of rivers designated wild, recreational, scenic, or under consideration for such designation.

(2) Agencies with jurisdiction over Federal and Federal-State water related planning and review processes, including the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, shall notify the Regional Administrator that they wish to comment on a permit application, draft permit, or draft general permit within 20 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of receipt by the Regional Administrator of the permit application, draft permit, or draft general permit. The Regional Administrator may allow any such agency up to an additional 30 days to submit comments, upon request of such agency.

(3) All comments from the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service on permit applications, draft permits, and draft general permits shall be considered by the Regional Administrator. If the Regional Administrator does not adopt a recommendation of any such agency, he shall consult with that agency. The final decision to object or to require permit conditions shall be made by the Regional Administrator.

(c) *Coordination with other States.* If the proposed discharge may affect the quality of the waters of any State(s) other than the State in which the discharge occurs the State Director shall provide an opportunity for such State(s) to submit written comments within the public comment period on the effect of the proposed discharge on such State(s) waters, and to suggest additional permit conditions. If these recommendations are not accepted by the State Director, he shall notify the affected State and the Regional Administrator in writing of his failure to accept these recommendations, together with his reasons for so doing.

[Note.—States are encouraged to receive and use information developed by the U.S. Fish and Wildlife Service as part of the National Wetlands Inventory as it becomes available.]

§ 123.103 Enforcement authority.

In addition to meeting the requirements of § 123.9, State section 404 programs shall include procedures which enable the State Director to immediately and effectively halt or remove any unauthorized discharges of dredged or fill material, including the authority to issue a cease and desist order, interim protective order, or restoration order to any person responsible for, or involved in, an unauthorized discharge.

§ 123.104 Approval process.

(a) Within 10 days of receipt of a complete State section 404 program submission under § 123.3, the Administrator shall provide copies of the State's submission to the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

(b) After determining that a State program submission is complete, EPA shall publish notice of the State's application in the **Federal Register**, and in enough of the largest newspapers in the State to attract Statewide attention, and shall mail notice to persons known to be interested in such matters, including all persons on appropriate State, EPA, Corps of Engineers, U.S. Fish and Wildlife Service, and National Marine Fisheries Service mailing lists and all permit holders and applicants within the State. This notice shall:

(1) Provide a comment period of not less than 45 days during which interested members of the public may express their views on the State program;

(2) Provide for a public hearing within the State to be held no less than 30 days after notice of the hearing is published in the **Federal Register**;

(3) Indicate the cost of obtaining a copy of the State's submission;

(4) Indicate where and when the State's submission may be reviewed by the public;

(5) Indicate whom an interested member of the public should contact with any questions; and

(6) Briefly outline the fundamental aspects of the State's proposed program, and the process for EPA review and decision.

(c) Within 90 days of receipt of a complete program submission under § 123.3, the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service shall submit any comments on the State program.

(d) Within 120 days of the receipt of a complete program submission under § 123.3, the Administrator shall approve or disapprove the program based on the requirements of this Part and of CWA and taking into consideration all comments received. A responsiveness summary shall be prepared by the Regional Office which identifies the public participation activities conducted, describes the matters presented to the public, summarizes significant comments received, and explains the Agency's response to these comments. The Administrator shall respond individually to comments received from the Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

(e) If the Administrator approves the State's section 404 program he or she shall notify the State and the Secretary and publish notice in the **Federal Register**. The Secretary shall suspend the issuance of section 404 permits by the Corps of Engineers within the State, except for those waters specified in section 404(g)(1) of CWA and not identified in the program description under § 123.4(h)(1) as State regulated waters.

(f) If the Administrator disapproves the State program he or she shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State program which are necessary to obtain approval.

Subpart F—Requirements for Interim Authorization of State Hazardous Waste Programs

§ 123.121 Purpose and scope.

(a) This subpart specifies all of the requirements a State program must meet in order to obtain interim authorization under section 3006(c) of RCRA. The requirements a State program must meet in order to obtain final authorization under section 3006(b) of RCRA are specified in Subparts A and B.

(b) Interim authorization of State programs under this Subpart may occur in two phases. The first phase (Phase I) allows States to administer a hazardous waste program in lieu of and corresponding to that portion of the Federal program which covers identification and listing of hazardous waste (40 CFR Part 261), generators (40 CFR Part 262) and transporters (40 CFR Part 263) of hazardous wastes, and establishes preliminary (interim status) standards for hazardous waste treatment, storage and disposal facilities (40 CFR Part 265). The second phase (Phase II) allows States with interim authority for Phase I to establish a permit program for hazardous waste treatment, storage and disposal facilities in lieu of and corresponding to the Federal hazardous waste permit program (40 CFR Parts 264 and 266). States may apply for interim authorization either sequentially (application for interim authorization for Phase I followed by an amendment of that application for Phase II) or all at once (application for interim authorization for both Phases I and II at the same time) as long as they adhere to the schedule in § 123.122.

(c) The Administrator shall approve a State program which meets the applicable requirements of this Subpart.

(d) Upon approval of a State program for Phase II, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program.

(e) Any State program approved by the Administrator under this Subpart shall at all times be conducted in accordance with this Subpart.

(f) Lack of authority to regulate activities on Indian lands does not impair a State's ability to obtain interim authorization under this Subpart. EPA will administer the program on Indian lands if the State does not seek this authority.

[Note.—States are advised to contact the United States Department of Interior, Bureau of Indian Affairs, concerning authority over Indian lands.]

(g) Nothing is this Subpart precludes a State from:

(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this Subpart.

(2) Operating a program with a greater scope of coverage than that required under this Subpart. Where an approved program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

§ 123.122 Schedule.

(a) Interim authorization for Phase I shall not take effect until Phase I commences. Interim authorization for Phase II shall not take effect until Phase II commences.

(b) Interim authorization may extend for a 24-month period from the commencement of Phase II. At the end of this period all interim authorizations automatically expire and EPA shall administer the Federal program in any State which has not received final authorization.

(c) A State may apply for interim authorization at any time prior to expiration of the 6th month of the 24-month period beginning with the commencement of Phase II.

(1) States applying for interim authorization prior to the promulgation of Phase II shall apply only for interim authorization for Phase I.

(2) States applying for interim authorization after the promulgation of Phase II but before the commencement of Phase II may apply either for interim authorization for both Phase I and Phase II or only for interim authorization for Phase I.

(3) States applying for interim authorization after the commencement of Phase II shall apply for interim authorization for both Phase I and Phase II, unless they have already applied for interim authorization for Phase I.

(4) States which have received interim authorization for Phase I shall amend their original submission to meet the requirements for interim authorization for Phase II not later than 6 months after the effective date of Phase II.

(d) No State may apply for interim authorization for Phase II unless it has received interim authorization for Phase I or is simultaneously applying for interim authorization for both Phase I and Phase II.

§ 123.123 Elements of a program submission.

(a) States applying for interim authorization shall submit at least three copies of a program submission to EPA containing the following:

(1) A letter from the Governor of the State requesting State program approval;

(2) A complete program description, as required by § 123.124, describing how the State intends to carry out its responsibilities under this subpart;

(3) An Attorney General's statement as required by § 123.125;

(4) A Memorandum of Agreement with the Regional Administrator as required by § 123.126;

(5) An authorization plan as required by § 123.127;

(6) Copies of all applicable State statutes and regulations, including those governing State administrative procedures.

(b) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If a State's submission is found to be complete, EPA's formal review of the proposed State program shall be deemed to have begun on the date of receipt of the State's submission. See § 123.135. If a State's submission is found to be incomplete, formal review shall not begin until all the necessary information is received by EPA.

(c) If the State's submission is materially changed during the formal review period, the formal review period shall recommence upon receipt of the revised submission.

(d) States simultaneously applying for interim authorization for both Phase I and Phase II shall prepare a single submission.

(e) States applying for interim authorization for Phase II shall amend their submission for interim authorization for Phase I as specified in §§ 123.124 to 123.127.

§ 123.124 Program description.

Any State that wishes to administer a program under this Subpart shall submit to the Regional Administrator a complete description of the program it proposes to administer in lieu of the Federal program under State law. A State applying only for interim authorization for Phase II shall amend its program description for interim authorization for Phase I as necessary to reflect the program it proposes to administer to meet the requirements for interim authorization for Phase II. The program description shall include:

(a) A description in narrative form of the scope, structure, coverage, and processes of the State program.

(b) A description (including organization charts) of the organization and structure of the State agency or agencies which will have responsibility for administering the program including the information listed below. If more than one agency is responsible for administration of the program, each agency must have Statewide jurisdiction over a class of activities. The responsibilities of each agency must be delineated, their procedures for coordination set forth, and one of the agencies must be designated a "lead agency" to facilitate communications between EPA and the State agencies having program responsibility. Where the State proposes to administer a program of greater scope of coverage than is required by Federal law, the information provided under this section shall indicate the resources dedicated to administering the Federally required portion of the program.

(1) A description of the State agency staff who will be engaged in carrying out the State program, including the number, occupations, and general duties of the employees. The State need not submit complete job descriptions for every employee engaged in carrying out the State program.

(2) An itemization of the proposed or actual costs of establishing and administering the program, including cost of the personnel listed in paragraph (b)(1) of this section, cost of administrative support and cost of technical support.

(3) An itemization of the sources and amounts of funding, including an estimate of Federal grant money, available to the State Director to meet the costs listed in paragraph (b)(2) of this section identifying any restrictions or limitations upon this funding.

(c) A description of applicable State procedures, including permitting procedures, and any State appellate review procedures.

[Note.—States applying only for interim authorization for Phase I need describe permitting procedures only to the extent they will be utilized to assure compliance with standards substantially equivalent to 40 CFR Part 265.]

(d) Copies of the forms and the manifest format the State intends to use in its program. Forms used by the State need not be identical to the forms used by EPA, but should require the same basic information. If the State chooses to use uniform national forms it should so note.

(e) A complete description of the State's compliance monitoring and enforcement program.

(f) A description of the State manifest system if the State has such a system and of the procedures the State will use to coordinate information with other approved State programs and the Federal program regarding interstate and international shipments.

(g) An estimate of the number of the following:

(1) Generators;

(2) Transporters; and

(3) On- and off-site treatment, storage and disposal facilities including a brief description of the types of facilities and an indication, if applicable, of the permit status of these facilities.

§ 123.125 Attorney General's statement.

(a) Any State seeking to administer a program under this Subpart shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independent legal counsel), that the laws of the State, or the interstate compact, provide adequate authority to carry out the program described under § 123.124 and to meet the applicable requirements of this Subpart. This statement shall include citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions which demonstrate adequate authority. Except as provided in § 123.126(d), the State Attorney General or independent legal counsel must certify that the enabling legislation for the program for Phase I was in existence within 90 days of the promulgation of Phase I. In the case of a State applying for interim authorization for Phase II, the State Attorney General or independent legal counsel must certify that the enabling legislation for the program for Phase II was in existence within 90 days of the promulgation of Phase II. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be lawfully adopted at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program. In the case of a State applying only for interim authorization for Phase II, the Attorney General's statement submitted for interim authorization for Phase I shall be amended and recertified to demonstrate adequate authority to carry out all the requirements of this Subpart.

(b)(1) In the case of a State applying only for interim authorization for Phase I, the Attorney General's statement shall certify that the authorization plan under § 123.127(a), if carried out, would provide the State with enabling authority and regulations adequate to meet the requirements for final authorization contained in Phase I.

(2) In the case of a State applying for interim authorization for Phase II, the Attorney General's statement shall certify that the authorization plan under § 123.127(b), if carried out, would provide the State with enabling authority and regulations adequate to meet all the requirements for final authorization.

(c) Where a State seeks authority over activities on Indian lands, the statement shall contain an appropriate analysis of the State's authority.

§ 123.126 Memorandum of Agreement.

(a) The State Director and the Regional Administrator shall execute a Memorandum of Agreement (MOA). In addition to meeting the requirements of paragraph (b) of this section, and, if applicable, paragraph (c) of this section, the Memorandum of Agreement may include other terms, conditions, or agreements relevant to the administration and enforcement of the State's regulatory program which are not inconsistent with this subpart. No Memorandum of Agreement shall be approved which contains provisions which restrict EPA's statutory oversight responsibility. In the case of a State applying for interim authorization for

Phase II, the Memorandum of Agreement shall be amended and re-executed to include the requirements of paragraph (c) of this section and any revisions to the requirements of paragraph (b) of this section.

(b) The Memorandum of Agreement shall include the following:

(1) Provisions for the prompt transfer from EPA to the State of information obtained in notifications made pursuant to section 3010 of RCRA and received by EPA prior to the approval of the State program, EPA identification numbers for new generators, transporters, and treatment, storage, and disposal facilities, and any other information relevant to effective program operation not already in the possession of the State Director (e.g., pending permit applications, compliance reports, etc.).

(2) Provisions specifying the frequency and content of reports, documents, and other information which the State is required to submit to EPA. The State shall allow EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program. State reports may be combined with grant reports when appropriate.

(3) Provisions on the State's compliance monitoring and enforcement program, including:

(i) Provisions for coordination of compliance monitoring activities by the State and EPA. These may specify the basis on which the Regional Administrator will select facilities or activities within the State for EPA inspection. The Regional Administrator will normally notify the State at least 7 days before any such inspection; and

(ii) Procedures to assure coordination of enforcement activities.

(4) Provisions for modification of the Memorandum of Agreement in accordance with this Part.

(5) A provision allowing EPA to conduct compliance inspections of all generators, transporters, and HWM facilities during interim authorization. The Regional Administrator and the State Director may agree to limitations regarding compliance inspections of generators, transporters, and non-major HWM facilities.

(6) A provision that no limitations on EPA compliance inspections of generators, transporters, and non-major HWM facilities under paragraph (b)(5) of this section shall restrict EPA's right to inspect any HWM facility, generator, or transporter which it has cause to believe is not in compliance with RCRA; however, before conducting such an inspection, EPA will normally allow the State a reasonable opportunity to conduct a compliance evaluation inspection.

(7) A provision delineating respective State and EPA responsibilities during the interim authorization period.

(c) In the case of a State applying for interim authorization for Phase II, the Memorandum of Agreement shall also include the following:

(1) Provisions for prompt transfer from EPA to the State of pending permit applications and support files for permit issuance. Where existing permits are transferred to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring responsibility for these permits. If a State lacks the authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.

(2) Provisions specifying classes and categories of permit applications and draft permits that the State Director will send to the Regional Administrator for review and comment. The State Director shall promptly forward to EPA copies of permit applications and draft permits for all major HWM facilities. The Regional Administrator and the State Director may agree to limitations regarding review of and comment on permit applications and draft permits for non-major HWM facilities. The State Director shall supply EPA copies of final permits for all major HWM facilities.

(3) Where appropriate, provisions for joint processing of permits by the State and EPA for facilities or activities which require permits under different programs, from both EPA and the State.

§ 123.127 Authorization plan.

The State must submit an "authorization plan" which shall describe the additions and modifications necessary for the State program to qualify for final authorization as soon as practicable, but no later than the end of the interim authorization period. This plan shall include the nature of and schedules for any changes in State legislation and regulations; resource levels; actions the State must take to control the complete universe of hazardous waste listed or designated under section 3001 of RCRA as soon as possible; the manifest and permit systems; and the surveillance and enforcement program which will be necessary in order for the State to become eligible for final authorization.

(a) In the case of a State applying only for interim authorization for Phase I, the authorization plan shall describe the additions and modifications necessary for the State program to meet the requirements for final authorization contained in Phase I.

(b) In the case of a State applying for interim authorization for Phase II, the authorization plan under paragraph (a) of this section shall be amended to describe the further additions and modifications necessary for the State program to meet all the requirements for final authorization.

§ 123.128 Program requirements for interim authorization for Phase I.

The following requirements are applicable to States applying for interim authorization for Phase I. If a State does not have legislative authority or regulatory control over certain activities that do not occur in the State, the State may be granted interim authorization for Phase I provided the State authorization plan under § 123.127 provides for the development of a complete program as soon as practicable after receiving interim authorization.

(a) *Requirements for identification and listing of hazardous waste.* The State program must control a universe of hazardous wastes generated, transported, treated, stored, and disposed of in the State which is nearly identical to that which would be controlled by the Federal program under 40 CFR Part 261.

(b) *Requirements for generators of hazardous waste.* (1) This paragraph applies unless the State comes within the exceptions described under paragraph (d) of this section.

(2) The State program must cover all generators of hazardous wastes controlled by the State.

(3) The State shall have the authority to require and shall require all generators covered by the State program to comply with reporting and recordkeeping requirements substantially equivalent to those found at 40 CFR §§ 262.40 and 262.41.

(4) The State program must require that generators who accumulate hazardous wastes for short periods of time prior to shipment do so in a manner that does not present a hazard to human health or the environment.

(5) The State program shall provide requirements respecting international shipments which are substantially equivalent to those at 40 CFR § 262.50, except that advance notification of international shipment, as required by 40 CFR § 262.50(b)(1), shall be filed with the Administrator. The State may require that a copy of such advance notice be filed with the State Director, or may require equivalent reporting procedures.

[Note.—Such notices shall be mailed to Hazardous Waste Export, Division for

Oceans and Regulatory Affairs (A-107), U.S. Environmental Protection Agency, Washington, D.C. 20460.]

(6) The State program must require that such generators of hazardous waste who transport (or offer for transport) such hazardous waste off-site use a manifest system that ensures that inter- and intrastate shipments of hazardous waste are designated for delivery, and, in the case of intrastate shipments, are delivered only to facilities that are authorized to operate under an approved State program or the Federal program.

(7) The State manifest system must require that:

(i) The manifest itself identify the generator, transporter, designated facility to which the hazardous waste will be transported, and the hazardous waste being transported;

(ii) The manifest accompany all wastes offered for transport, except in the case of shipments by rail or water specified in §§ 262.23(c) and 263.20(e); and

(iii) Shipments of hazardous waste that are not delivered to a designated facility are either identified and reported by the generator to the State in which the shipment originated or are independently identified by the State in which the shipment originated.

(8) In the case of interstate shipments for which the manifest has not been returned, the State program must provide for notification to the State in which the facility designated on the manifest is located and to the State in which the shipment may have been delivered (or to EPA in the case of unauthorized States).

(c) *Requirements for transporters of hazardous wastes.* (1) This paragraph applies unless the State comes within the exceptions described under paragraph (d) of this section.

(2) The State program must cover all transporters of hazardous waste controlled by the State.

(3) The State shall have the authority to require and shall require all transporters covered by the State program to comply with recordkeeping requirements substantially equivalent to those found at 40 CFR § 263.22.

(4) The State program must require such transporters of hazardous waste to use a manifest system that ensures that inter- and intrastate shipments of hazardous waste are delivered only to facilities that are authorized under an approved State program or the Federal program.

(5) The State program must require that transporters carry the manifest with all shipments, except in the case of shipments by rail or water specified in 40 CFR § 263.20(e).

(6) For hazardous wastes that are discharged in transit, the State program must require that transporters notify appropriate State, local, and Federal agencies of the discharges, and clean up the wastes or take action so that the wastes do not present a hazard to human health or the environment. These requirements shall be substantially equivalent to those found at 40 CFR §§ 263.30 and 263.31.

(d) *Limited exceptions from generator, transporter, and related manifest requirements.* A State applying for interim authorization for Phase I which meets all the requirements for such interim authorization except that it does not have statutory or regulatory authority for the manifest system or other generator or transporter requirements discussed in paragraphs (b) and (c) of this section may be granted interim authorization, if the State authorization plan under § 123.127 delineates the necessary steps for obtaining this authority no later than the end of the interim authorization period under § 123.122(b). A State may apply for interim authorization to implement the manifest system and other generator and transporter requirements if the enabling legislation for that part of the program was in existence within 90 days of the promulgation of Phase I. If such application is made, it shall be made as part of the State's submission for interim authorization for Phase II. Until the State manifest system and other generator and transporter requirements are approved by EPA, all Federal requirements for generators and transporters (including use of the Federal manifest system) shall apply in such States and enforcement responsibility for that part of the program shall remain with the Federal Government. The universe of wastes for which these Federal requirements apply shall be the universe of wastes controlled by the State under paragraph (a) of this section.

(e) *Requirements for hazardous waste treatment, storage, and disposal facilities.* States must have standards applicable to HWM facilities which are substantially equivalent to 40 CFR Part 265. State law shall prohibit the operation of facilities not in compliance with such standards. These standards shall include:

(1) Preparedness for and prevention of releases of hazardous waste controlled by the State under paragraph (a) of this section and contingency plans and emergency procedures to be followed in the event of a release of such hazardous waste;

(2) Closure and post-closure requirements;

(3) Groundwater monitoring;

(4) Security to prevent unknowing and unauthorized access to the facility;

(5) Facility personnel training;

(6) Inspection, monitoring, recordkeeping, and reporting;

(7) Compliance with the manifest system including the requirement that the facility owner or operator or the State in which the facility is located must return a copy of the manifest to the generator or to the State in which the generator is located indicating delivery of the waste shipment; and

(8) Other facility standards to the extent that they are included in 40 CFR Part 265, except that Subpart R (standards for injection wells) may be included in the State standards at the State's option.

(f) *Requirements for enforcement authority.* (1) Any State agency administering a program under this Subpart shall have the following authority to remedy violations of State program requirements:

(i) Authority to restrain immediately by order or by suit in State court any person from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;

(ii) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including, where appropriate, permit conditions, without the necessity of a prior revocation of the permit; and

(iii) For any program violation, to assess or sue to recover in court civil penalties in at least the amount of $1000 per day or to seek criminal fines in at least the amount of $1000 per day.

(2) Any State agency administering a program under this Subpart shall provide for public participation in the State enforcement process by providing either:

(i) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraph (f)(1) of this section by any citizen having an interest which is or may be adversely affected; or

(ii) Assurance that the State agency or enforcement authority will:

(A) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in paragraph (g)(2)(iv) of this section;

(B) Not oppose intervention by any citizen where permissive intervention may be authorized by statute, rule, or regulation; and

(C) Publish and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

(g) *Requirements for compliance evaluation programs.* (1) A State program under this Subpart shall have procedures for receipt, evaluation, recordkeeping, and investigation for possible enforcement of all required notices and reports.

(2) A State program shall have independent inspection and surveillance authority and procedures to determine compliance or noncompliance with applicable program requirements. This shall include:

(i) The capability to make comprehensive surveys of any activities subject to the State Director's authority in order to identify persons subject to regulation who have failed to comply with program requirements;

(ii) A program for periodic inspections of the activities subject to regulation;

(iii) The capability to investigate evidence of violations of applicable program and permit requirements; and

(iv) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures.

(3) The State officers engaged in compliance evaluation activities shall have authority to enter any conveyance, vehicle, facility, or premises subject to regulation or in which records relevant to program operation are kept in order to inspect, monitor, or otherwise investigate compliance with the State program. States whose law requires a search warrant prior to entry conform with this requirement.

(4) Investigatory inspections shall be conducted, samples shall be taken, and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court.

§ 123.129 Additional program requirements for interim authorization for Phase II.

In addition to the requirements of § 123.128, the following requirements are applicable to States applying for interim authorization for Phase II.

(a) State programs must have standards applicable to hazardous waste management facilities that provide substantially the same degree of human health and environmental protection as the standards promulgated under 40 CFR Parts 264 and 266.

(b) State programs shall require a permit for owners and operators of those hazardous waste treatment, storage, and disposal facilities which handle any waste controlled by the State under § 123.128(a) and for which a permit is required under 40 CFR Part 122. The State program shall prohibit the operation of such facilities without a permit, provided States may authorize owners and operators of facilities which would qualify for interim status under the Federal program (if State law so authorizes) to remain in operation pending permit action. Where State law authorizes such continued operation it shall require compliance by owners and operators of such facilities with standards substantially equivalent to EPA's interim status standards under 40 CFR Part 265.

(c) All permits issued by the State under this section shall require compliance with the standards adopted by the State in accordance with paragraph (a) of this section.

(d) State programs shall have requirements for permitting which are substantially equivalent to the provisions listed in §§ 123.7(a) and (b).

(e) No permit may be issued by a State with interim authorization for Phase II with a term greater than ten years.

§ 123.130 Interstate movement of hazardous waste.

(a) If a waste is transported from a State where it is listed or designated as hazardous under the program applicable in that State, whether that is the Federal program or an approved State program, into a State with interim authorization where it is not listed or designated, the waste must be manifested in accordance with the laws of the State where the waste was generated and must be treated, stored, or disposed of as required by the laws of the State into which it has been transported.

(b) If a waste is transported from a State with interim authorization where it is not listed or designated as hazardous into a State where it is listed or designated as hazardous under the program applicable in that State, whether that is the Federal program or an approved State program, the waste must be treated, stored, or disposed of in accordance with the law applicable in the State into which it has been transported.

(c) In all cases of interstate movement of hazardous waste, as defined by 40 CFR Part 261, generators and transporters must meet DOT requirements in 49 CFR Parts 172, 173, 178, and 179 (e.g., for shipping paper, packaging, labeling, marking, and placarding).

§ 123.131 Progress reports.

The State Director shall submit a semi-annual progress report to the EPA Regional Administrator within 4 weeks of the date 6 months after Phase I commences, and at 6-month intervals thereafter until the expiration of interim authorization. The reports shall briefly summarize, in a manner and form prescribed by the Regional Administrator, the State's compliance in meeting the requirements of the authorization plan, the reasons and proposed remedies for any delay in meeting milestones, and the anticipated problems and solutions for the next reporting period.

§ 123.132 Sharing of information.

(a) Any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction. If the information has been submitted to the State under a claim of confidentiality, the State must submit that claim to EPA when providing information under this Subpart. Any information obtained from a State and subject to a claim of confidentiality will be treated in accordance with the regulations in 40 CFR Part 2. If EPA obtains from a State information that is not claimed to be confidential, EPA may make that information available to the public without further notice.

(b) EPA shall furnish to States with approved programs the information in its files not submitted under a claim of confidentiality which the State needs in order to implement its approved program. EPA shall furnish to States with approved programs information submitted to EPA under a claim of confidentiality, which the State needs in order to implement its approved program, subject to the conditions in 40 CFR Part 2.

§ 123.133 Coordination with other programs.

(a) Issuance of State permits under this Part may be coordinated, as provided in Part 124, with issuance of NPDES, 404, and UIC permits whether they are controlled by the State, EPA, or the Corps of Engineers.

(b) The State Director of any approved program which may affect the planning for and development of hazardous waste management facilities and practices shall consult and coordinate with agencies designated under section 4006(b) of RCRA (40 CFR Part 255) as responsible for the development and implementation of

State solid waste management plans under section 4002(b) of RCRA (40 CFR Part 256).

§ 123.134 EPA review of State permits.

(a) The Regional Administrator may comment on permit applications and draft permits as provided in the Memorandum of Agreement under § 123.126.

(b) Where EPA indicates, in a comment, that issuance of the permit would be inconsistent with the approved State program, EPA shall include in the comment:

(1) A statement of the reasons for the comment (including the section of RCRA or regulations promulgated thereunder that support the comment); and

(2) The actions that should be taken by the State Director in order to address the comments (including the conditions which the permit would include if it were issued by the Regional Administrator).

(c) A copy of any comment shall be sent to the permit applicant by the Regional Administrator.

(d) The Regional Administrator shall withdraw such comment when satisfied that the State has met or refuted his or her concerns.

(e) Under section 3008(a)(3) of RCRA, EPA may terminate a State-issued permit in accordance with the procedures of Part 124, Subpart E or bring an enforcement action in accordance with the procedures of 40 CFR Part 22 in the case of a violation of a State program requirement. In exercising these authorities, EPA will observe the following conditions:

(1) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition of that permit.

(2) The Regional Administrator may take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition that the Regional Administrator in commenting on the permit application or draft permit stated was necessary to implement approved State program requirements, whether or not that condition was included in the final permit.

(3) The Regional Administrator may not take action under section 3008(a)(3) of RCRA against a holder of a State-issued permit on the ground that the permittee is not complying with a condition necessary to implement approved State program requirements unless the Regional Administrator stated in commenting on the permit application or draft permit that that condition was necessary.

(4) The Regional Administrator may take action under section 7003 of RCRA against a permit holder at any time whether or not the permit holder is complying with the permit conditions.

§ 123.135 Approval process.

(a) Within 30 days of receipt of a complete program submission for interim authorization, the Regional Administrator shall:

(1) Issue notice in the **Federal Register** and in accordance with § 123.39(a)(1) of a public hearing on the State's application for interim authorization. Such public hearing will be held by EPA no earlier than 30 days after notice of the hearing, provided that if significant public interest in a hearing is not expressed, the hearing may be cancelled if a statement to this effect is included in the public notice. The State shall participate in any public hearing held by EPA.

(2) Afford the public 30 days after the notice to comment on the State's submission; and

(3) Note the availability of the State's submission for inspection and copying by the public. The State submission shall, at a minimum, be available in the main office of the lead State agency and in the EPA Regional Office.

(b) Within 90 days of the notice in the **Federal Register** required by paragraph (a)(1) of this section, the Administrator shall make a final determination whether or not to approve the State's program taking into account any comments submitted. The Administrator will give notice of this final determination in the **Federal Register** and in accordance with § 123.39(a)(1). The notification shall include a concise statement of the reasons for this determination, and a response to significant comments received.

(c) Where a State has received interim authorization for Phase I the same procedures required in paragraphs (a) and (b) of this section shall be used in determining whether this amended program submission meets the requirements of the Federal program.

§ 123.136 Withdrawal of State programs.

(a) The criteria and procedures for withdrawal set forth in §§ 123.14 and 15 apply to this section.

(b) In addition to the criteria in § 123.14, a State program may be withdrawn if a State which has obtained interim authorization fails to meet the schedule for or accomplish the additions or revisions of its program set forth in its authorization plan.

§ 123.137 Reversion of State programs.

(a) A State program approved for interim authorization for Phase I shall terminate on the last day of the 6th month after the effective date of Phase II and EPA shall administer and enforce the Federal program in the State commencing on that date if the State has failed to submit by that date an amended submission pursuant to § 123.122(c)(4).

(b) A State program approved for interim authorization for Phase I shall terminate and EPA shall administer and enforce the Federal program in the State if the Regional Administrator determines pursuant to § 123.135(c) that a program submission amended pursuant to § 123.122(c)(4) does not meet the requirements of the Federal program.

PART 124—PROCEDURES FOR DECISIONMAKING

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Appendix A to Part 124—Guide to Decisionmaking under Part 124.

Authority: Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq:* Safe Drinking Water Act, 42 U.S.C. § 300(f) *et seq;* Clean Water Act, 33 U.S.C. § 1251 *et seq:* and Clean Air Act, 42 U.S.C. § 1857 *et seq.*

Subpart A—General Program Requirements

§ 124.1 Purpose and scope.

(a) This Part contains EPA procedures for issuing, modifying, revoking and reissuing, or terminating all RCRA, UIC, PSD and NPDES "permits" other than RCRA and UIC "emergency permits" (see §§ 122.27 and 122.40) and RCRA "permits by rule" (§ 122.26). The latter kinds of permits are governed by Subpart A of Part 122. RCRA interim status and UIC authorization by rule are not "permits" and are covered by specific provisions in Subpart A of Part 122. This Part also does not apply to permits issued, modified, revoked and reissued or terminated by the Corps of Engineers. Those procedures are specified in 33 CFR Parts 320–327.

(b) Part 124 is organized into six subparts. Subpart A contains general procedural requirements applicable to all permit programs covered by these regulations. Subparts B through F supplement these general provisions with requirements that apply to only one or more of the programs. Subpart A describes the steps EPA will follow in receiving permit applications, preparing draft permits, issuing public notice, inviting public comment and holding public hearings on draft permits. Subpart A also covers assembling an administrative record, responding to comments, issuing a final permit decision, and allowing for administrative appeal of the final permit decision. Subpart B is reserved for specific procedural requirements for RCRA permits. There are none of these at present but they may be added in the future. Subpart C contains definitions and specific procedural requirements for PSD permits. Subpart D applies to NPDES permits until an evidentiary hearing begins, when Subpart E procedures take over for EPA-issued NPDES permits and EPA-terminated RCRA permits. Subpart F, which is based on the "initial licensing" provisions of the Administrative Procedure Act (APA), can be used instead of Subparts A through E in appropriate cases.

(c) Part 124 offers an opportunity for three kinds of hearings: a public hearing under Subpart A, an evidentiary hearing under Subpart E, and a panel hearing under Subpart F. This chart describes when these hearings are available for each of the five permit programs.

Hearings Available Under This Part

Programs	Subpart		
	(A) Public hearing	(E) Evidentiary hearing	(F) Panel hearing
RCRA	On draft permit, at Director's discretion or on request (§ 124.12).	(1) Permit termination (RCRA section 3008). (2) With NPDES evidentiary hearing (§ 124.74(b)(2))	(1) At RA's discretion in lieu of public hearing (§§ 124.12 and 124.111(a)(3)). (2) When consolidated with NPDES draft permit processed under Subpart F (§ 124.111(a)(1)(i)).
UIC	On draft permit, at Director's discretion or on request (§ 124.12)	With NPDES evidentiary hearing (§ 124.74(b)(2))	(1) At RA's discretion in lieu of public hearing (§§ 124.12 and 124.111(a)(3)). (2) When consolidated with NPDES draft permit processed under Subpart F (§ 124.111(a)(1)(i))
PSD	On draft permit, at Director's discretion or on request (§ 124.12)	Not available (§ 124.71(c))	When consolidated with NPDES draft permit processed under Subpart F if RA determines that CAA one year deadline will not be violated
NPDES (other than general permit)	On draft permit, at Director's discretion or on request (§ 124.12)	(1) On request to challenge any permit condition or variance (§ 124.74). (2) At RA's discretion for any 301(h) request. (§ 124.64(b))	(1) At RA's discretion when first decision on permit or variance request (§ 124.111) (2) At RA's discretion when request for evidentiary hearing is granted under § 124.75(a)(2) (§§ 124.74(c)(8) and 124.111(a)(2)) (3) At RA's discretion for any 301(h) request (§ 124.64(b))
NPDES (general permit)	On draft permit, at Director's discretion or on request (§ 124.12).	Not available (§ 124.71)(a)	At RA's discretion in lieu of public hearing (§ 124.111(a)(3))
404	On draft permit or on application when no draft permit, at Director's discretion or on request (§ 124.12)	Not available (§ 124.71)	Not available (§ 124.111)

(d) This Part is designed to allow permits for a given facility under two or more of the listed programs to be processed separately or together at the choice of the Regional Administrator. This allows EPA to combine the processing of permits only when appropriate, and not necessarily in all cases. The Regional Administrator may consolidate permit processing when the permit applications are submitted, when draft permits are prepared, or when final permit decisions are issued. This Part also allows consolidated permits to be subject to a single public hearing under § 124.12, a single evidentiary hearing under § 124.75, or a single non-adversary panel hearing under § 124.120. Permit applicants may recommend whether or not their applications should be consolidated in any given case.

(e) Certain procedural requirements set forth in Part 124 must be adopted by States in order to gain EPA approval to operate RCRA, UIC, NPDES, and 404 permit programs. These requirements are listed in § 123.7 and signaled by the following words at the end of the appropriate Part 124 section or paragraph heading: (*applicable to State programs, see § 123.7*). Part 124 does not apply to PSD permits issued by an approved State.

(f) To coordinate decisionmaking when different permits will be issued by EPA and approved State programs, this Part allows applications to be jointly processed, joint comment periods and hearings to be held, and final permits to be issued on a cooperative basis whenever EPA and a State agree to take such steps in general or in individual cases. These joint processing agreements may be provided in the Memorandum of Agreement developed under § 123.6.

§ 124.2 Definitions.

(a) The definitions in Part 122 apply to this Part except for PSD permits which are governed by the definitions in § 124.41.

(b) For the purposes of Part 124, the term "Director" means the State Director or Regional Administrator and is used when the accompanying provision is required of EPA administered programs and of State programs under § 123.7. The term "Regional Administrator" is used when the accompanying provision applies exclusively to EPA-issued permits and is not applicable to State programs under § 123.7. While States are not required to implement these latter provisions, they are not precluded from doing so, notwithstanding use of the term "Regional Administrator."

(c) The term "formal hearing" means any evidentiary hearing under Subpart E or any panel hearing under Subpart F but does not mean a public hearing conducted under § 124.12.

§ 124.3 Application for a permit.

(a) (*Applicable to State programs, see § 123.7*). (1) Any person who requires a permit under the RCRA, UIC, NPDES, or PSD programs shall complete, sign, and submit to the Director an application for each permit required under §§ 122.21 (RCRA), 122.31 (UIC), 40 CFR 52.21 (PSD), and 122.51 (NPDES). Applications are not required for RCRA permits by rule (§ 122.26), underground injections authorized by rule (§ 122.37), NPDES general permits (§ 122.59) and 404 general permits (§ 123.95).

(2) The Director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit. See §§ 122.4, 122.22 (RCRA), 122.38 (UIC), 40 CFR 52.21 (PSD), and 122.53 (NPDES).

(3) Permit applications (except for PSD permits) must comply with the signature and certification requirements of § 122.6.

(b) In the case of a PSD permit issued to a facility or activity which 40 CFR § 52.21(k) exempts from the requirements of § 52.21 (l), (n), and (p), no proceedings under this Part shall be held to the extent that the Regional Administrator determines that proceedings providing the public with at least as much participation as this Part in the material determinations involved have already been held in the process of granting construction approval under the applicable State implementation plan. The Regional Administrator shall briefly document that finding and make it available to any member of the public upon request. The Regional Administrator shall prepare a draft permit under § 124.6 and follow the applicable procedures under this Part to the extent he or she is unable to make a finding under this subparagraph.

(c) The Regional Administrator shall review for completeness every application for an EPA-issued permit. Each application for an EPA-issued permit submitted by a new HWM facility, a new UIC injection well, a major PSD stationary source or major PSD modification, or an NPDES new source or NPDES new discharger should be reviewed for completeness by the Regional Administrator within 30 days of its receipt. Each application for an EPA-issued permit submitted by an existing HWM facility (both Parts A and B of the application), existing injection well or existing NPDES source should be reviewed for completeness within 60 days of receipt. Upon completing the review, the Regional Administrator shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Regional Administrator shall list the information necessary to make the application complete. When the application is for an existing HWM facility, an existing UIC injection well or an existing NPDES source, the Regional Administrator shall specify in the notice of deficiency a date for submitting the necessary information. The Regional Administrator shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Regional Administrator may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.

(d) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable statutory provision including RCRA section 3008, SDWA sections 1423 and 1424, CAA section 167, and CWA sections 308, 309, 402(h), and 402(k).

(e) If the Regional Administrator decides that a site visit is necessary for any reason in conjunction with the processing of an application, he or she shall notify the applicant and a date shall be scheduled.

(f) The effective date of an application is the date on which the Regional Administrator notifies the applicant that the application is complete as provided in paragraph (c) of this section.

(g) For each application from a major new HWM facility, major new UIC injection well, major NPDES new source, or major NPDES new discharger, the Regional Administrator shall, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. (This paragraph does not apply to PSD permits.) The schedule shall specify target dates by which the Regional Administrator intends to:

(1) Prepare a draft permit;

(2) Give public notice;

(3) Complete the public comment period, including any public hearing;

(4) Issue a final permit; and

(5) In the case of an NPDES permit, complete any formal proceedings under Subparts E or F.

§ 124.4 Consolidation of permit processing.

(a)(1) Whenever a facility or activity requires a permit under more than one statute covered by these regulations, processing of two or more applications for those permits may be consolidated. The first step in consolidation is to prepare each draft permit at the same time.

(2) Whenever draft permits are prepared at the same time, the statements of basis (required under § 124.7 for EPA-issued permits only) or fact sheets (§ 124.8), administrative records (required under § 124.9 for EPA-issued permits only), public comment periods (§ 124.10), and any public hearings (§ 124.12) on those permits should also be consolidated. The final permits may be issued together. They need not be issued together if in the judgment of the Regional Administrator or State Director(s), joint processing would result in unreasonable delay in the issuance of one or more permits.

(b) Whenever an exisiting facility or activity requires additional permits under one or more of the statutes covered by these regulations, the permitting authority may coordinate the expiration date(s) of the new permit(s) with the expiration date(s) of the existing permit(s) so that all permits expire simultaneously. Processing of the subsequent applications for renewal permits may then be consolidated.

(c) Processing of permit applications under paragraphs (a) or (b) of this section may be consolidated as follows:

(1) The Director may consolidate permit processing at his or her discretion whenever a facility or activity requires all permits either from EPA or from an approved State.

(2) The Regional Administrator and the State Director(s) may agree to consolidate draft permits whenever a facility or activity requires permits from both EPA and an approved State.

(3) Permit applicants may recommend whether or not the processing of their applications should be consolidated.

(d) Whenever permit processing is consolidated and the Regional Administrator invokes the "initial licensing" provisions of Subpart F for an NPDES, RCRA, or UIC permit, any permit(s) with which that NPDES, RCRA or UIC permit was consolidated shall likewise be processed under Subpart F.

(e) Except with the written consent of the permit applicant, the Regional Administrator shall not consolidate processing a PSD permit with any other permit under paragraphs (a) or (b) of this section or process a PSD permit under Subpart F as provided in paragraph (d) of this section when to do so would delay issuance of the PSD permit more than one year from the effective date of the application under § 124.3(f).

§ 124.5 Modification, revocation and reissuance, or termination of permits.

(a) (*Applicable to State programs, see § 123.7*). Permits (other than PSD permits) may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in §§ 122.15 or 122.16. All requests shall be in writing and shall contain facts or reasons supporting the request.

(b) If the Director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the Regional Administrator may be informally appealed to the Administrator by a letter briefly setting forth the relevant facts. The Administrator may direct the Regional Administrator to begin modification, revocation and reissuance, or termination proceedings under paragraph (c) of this section. The appeal shall be considered denied if the Administrator takes no action on the letter within 60 days after receiving it. This informal appeal is, under 5 U.S.C. § 704, a prerequisite to seeking judicial review of EPA action in denying a request for modification, revocation and reissuance, or termination.

(c) (*Applicable to State programs, see § 123.7*). (1) If the Director tentatively decides to modify or revoke and reissue a permit under § 122.15, he or she shall prepare a draft permit under § 124.6 incorporating the proposed changes. The Director may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the Director shall require the submission of a new application.

(2) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(3) "Minor modifications" as defined in § 122.17 are not subject to the requirements of this section.

(d) (*Applicable to State programs, see § 123.7*). If the Director tentatively decides to terminate a permit under § 122.16, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under § 124.6. In the case of EPA-issued permits, a notice of intent to terminate shall not be issued if the Regional Administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved State under § 123.6(b)(1).

(e) When EPA is the permitting authority, all draft permits (including notices of intent to terminate) prepared under this section shall be based on the administrative record as defined in § 124.9.

(f) (*Applicable to State programs, see § 123.7*). Any request by the permittee for modification to an existing 404 permit (other than a request for a minor modification as defined in § 122.17) shall be treated as a permit application and shall be processed in accordance with all requirements of § 124.3.

(g)(1) [Reserved for PSD Modification Provisions]

(2) PSD permits may be terminated only by rescission under § 52.21(w) or by automatic expiration under § 52.21(s). Applications for rescission shall be

processed under § 52.21(w) and are not subject to this Part.

§ 124.6 Draft permits.

(a) (*Applicable to State programs, see § 123.7*). Once an application is complete, the Director shall tentatively decide whether to prepare a draft permit (except in the case of State section 404 permits for which no draft permit is required under § 123.100) or to deny the application.

(b) If the Director tentatively decides to deny the permit application, he or she shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit which follows the same procedures as any draft permit prepared under this section. See § 124.6(e). If the Director's final decision (§ 124.15) is that the tentative decision to deny the permit application was incorrect, he or she shall withdraw the notice of intent to deny and proceed to prepare a draft permit under paragraph (d) of this section.

(c) (*Applicable to State programs, see § 123.7*). If the Director tentatively decides to issue an NPDES or 404 general permit, he or she shall prepare a draft general permit under paragraph (d) of this section.

(d) (*Applicable to State programs, see § 123.7*). If the Director decides to prepare a draft permit, he or she shall prepare a draft permit that contains the following information:

(1) All conditions under §§ 122.7 and 122.8 (except for PSD permits);

(2) All compliance schedules under § 122.10 (except for PSD permits);

(3) All monitoring requirements under § 122.11 (except for PSD permits); and

(4) For:

(i) RCRA permits, standards for treatment, storage, and/or disposal and other permit conditions under § 122.28;

(ii) UIC permits, permit conditions under § 122.42;

(iii) PSD permits, permit conditions under 40 CFR § 52.21;

(iv) 404 permits, permit conditions under §§ 123.97 and 123.98;

(v) NPDES permits, effluent limitations, standards, prohibitions and conditions under §§ 122.60 and 122.61, including when applicable any conditions certified by a State agency under § 124.55, and all variances that are to be included under § 124.63.

(e) (*Applicable to State programs, see § 123.7*). All draft permits prepared by EPA under this section shall be accompanied by a statement of basis (§ 124.7) or fact sheet (§ 124.8), and shall be based on the administrative record (§ 124.9), publicly noticed (§ 124.10) and made available for public comment (§ 124.11). The Regional Administrator shall give notice of opportunity for a public hearing (§ 124.12), issue a final decision (§ 124.15) and respond to comments (§ 124.17). For RCRA, UIC or PSD permits, an appeal may be taken under § 124.19 and, for NPDES permits, an appeal may be taken under § 124.74. Draft permits prepared by a State shall be accompanied by a fact sheet if required under § 124.8.

§ 124.7 Statement of basis.

EPA shall prepare a statement of basis for every draft permit for which a fact sheet under § 124.8 is not prepared. The statement of basis shall briefly describe the derivation of the conditions of the draft permit and the reasons for them or, in the case of notices of intent to deny or terminate, reasons supporting the tentative decision. The statement of basis shall be sent to the applicant and, on request, to any other person.

§ 124.8 Fact sheet.

(*Applicable to State programs, see § 123.7.*)

(a) A fact sheet shall be prepared for every draft permit for a major HWM, UIC, 404, or NPDES facility or activity, for every 404 and NPDES general permit (§§ 123.95 and 122.59), for every NPDES draft permit that incorporates a variance or requires an explanation under § 124.56(b), and for every draft permit which the Director finds is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

(1) A brief description of the type of facility or activity which is the subject of the draft permit;

(2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged.

(3) For a PSD permit, the degree of increment consumption expected to result from operation of the facility or activity.

(4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by § 124.9 (for EPA-issued permits);

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(6) A description of the procedures for reaching a final decision on the draft permit including:

(i) The beginning and ending dates of the comment period under § 124.10 and the address where comments will be received;

(ii) Procedures for requesting a hearing and the nature of that hearing; and

(iii) Any other procedures by which the public may participate in the final decision.

(7) Name and telephone number of a person to contact for additional information.

(8) For NPDES permits, provisions satisfying the requirements of § 124.56.

§ 124.9 Administrative record for draft permits when EPA is the permitting authority.

(a) The provisions of a draft permit prepared by EPA under § 124.6 shall be based on the administrative record defined in this section.

(b) For preparing a draft permit under § 124.6, the record shall consist of:

(1) The application, if required, and any supporting data furnished by the applicant;

(2) The draft permit or notice of intent to deny the application or to terminate the permit;

(3) The statement of basis (§ 124.7) or fact sheet (§ 124.8);

(4) All documents cited in the statement of basis or fact sheet; and

(5) Other documents contained in the supporting file for the draft permit.

(6) For NPDES new source draft permits only, any environmental assessment, environmental impact statement (EIS), finding of no significant impact, or environmental information document and any supplement to an EIS that may have been prepared. NPDES permits other than permits to new sources as well as all RCRA, UIC and PSD permits are not subject to the environmental impact statement provisions of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4321.

(c) Material readily available at the issuing Regional Office or published material that is generally available, and that is included in the administrative record under paragraphs (b) and (c) of this section, need not be physically included with the rest of the record as long as it is specifically referred to in the statement of basis or the fact sheet.

(d) This section applies to all draft permits when public notice was given after the effective date of these regulations.

§ 124.10 Public notice of permit actions and public comment period.

(a) *Scope.*

(1) The Director shall give public notice that the following actions have occurred:

(i) A permit application has been tentatively denied under § 124.6(b):

(ii) (*Applicable to State programs, see § 123.7*). A draft permit has been prepared under § 124.6(d);

(iii) (*Applicable to State programs, see § 123.7*). A hearing has been scheduled under § 124.12, Subpart E, or Subpart F;

(iv) An appeal has been granted under § 124.19(c);

(v) (*Applicable to State programs, see § 123.7*). A State section 404 application has been received in cases when no draft permit will be prepared (see § 123.100); or

(vi) An NPDES new source determination has been made under § 122.66.

(2) No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under § 124.5(b). Written notice of that denial shall be given to the requester and to the permittee.

(3) Public notices may describe more than one permit or permit action.

(b) *Timing (applicable to State programs, see § 123.7*). (1) Public notice of the preparation of a draft permit (including a notice of intent to deny a permit application) required under paragraph (a) of this section shall allow at least 30 days for public comment. For EPA-issued permits, if the Regional Administrator determines under 40 CFR Part 6, Subpart F that an Environmental Impact Statement (EIS) shall be prepared for an NPDES new source, public notice of the draft permit shall not be given until after a draft EIS is issued.

(2) Public notice of a public hearing shall be given at least 30 days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.)

(c) *Methods (applicable to State programs, see § 123.7).* Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

(1) By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits):

(i) The applicant (except for NPDES and 404 general permits when there is no applicant);

(ii) Any other agency which the Director knows has issued or is required to issue a RCRA, UIC, PSD, NPDES or 404 permit for the same facility or activity (including EPA when the draft permit is prepared by the State);

(iii) Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State Historic Preservation Officers, and other appropriate government authorities, including any affected States;

(iv) For NPDES and 404 permits only, any State agency responsible for plan development under CWA section 208(b)(2), 208(b)(4) or 303(e) and the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;

(v) For NPDES permits only, any user identified in the permit application of a privately owned treatment works;

(vi) For 404 permits only, any reasonably ascertainable owner of property adjacent to the regulated facility or activity and the Regional Director of the Federal Aviation Administration if the discharge involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations;

(vii) For PSD permits only, affected State and local air pollution control agencies, the chief executives of the city and county where the major stationary source or major modification would be located, any comprehensive regional land use planning agency and any State, Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the regulated activity;

(viii) Persons on a mailing list developed by:

(A) Including those who request in writing to be on the list;

(B) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

(C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals. (The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request.)

(2) For major permits and NPDES and 404 general permits, publication of a notice in a daily or weekly newspaper within the area affected by the facility or activity; and for EPA-issued NPDES general permits, in the **Federal Register**;

[Note.—The Director is encouraged to provide as much notice as possible of the NPDES or 404 draft general permit to the facilities or activities to be covered by the general permit.]

(3) When the program is being administered by an approved State, in a manner constituting legal notice to the public under State law; *and*

(4) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(d) *Contents (applicable to State programs, see § 123.7).* (1) *All public notices.* All public notices issued under this Part shall contain the following minimum information:

(i) Name and address of the office processing the permit action for which notice is being given;

(ii) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of NPDES and 404 draft general permits under §§ 122.59 and 123.95;

(iii) A brief description of the business conducted at the facility or activity described in the permit application or the draft permit, for NPDES or 404 general permits when there is no application.

(iv) Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, statement of basis or fact sheet, and the application; and

(v) A brief description of the comment procedures required by §§ 124.11 and 124.12 and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision.

(vi) For EPA-issued permits, the location of the administrative record required by § 124.9, the times at which the record will be open for public inspection, and a statement that all data submitted by the applicant is available as part of the administrative record.

(vii) For NPDES permits only, a general description of the location of each existing or proposed discharge point and the name of the receiving water. For draft general permits, this requirement will be satisfied by a map or description of the permit area. For EPA-issued NPDES permits only, if the discharge is from a new source, a statement as to whether an environmental impact statement will be or has been prepared.

(viii) For 404 permits only,

(A) The purpose of the proposed activity (including, in the case of fill material, activities intended to be conducted on the fill), a description of the type, composition, and quantity of materials to be discharged and means of conveyance; and any proposed conditions and limitations on the discharge;

(B) The name and water quality standards classification, if applicable, of the receiving waters into which the discharge is proposed, and a general description of the site of each proposed discharge and the portions of the site and the discharges which are within State regulated waters;

(C) A description of the anticipated environmental effects of activities conducted under the permit;

(D) References to applicable statutory or regulatory authority; and

(E) Any other available information which may assist the public in evaluating the likely impact of the proposed activity upon the integrity of the receiving water.

(ix) Any additional information considered necessary or proper.

(2) *Public notices for hearings.* In addition to the general public notice described in paragraph (d)(1) of this section, the public notice of a hearing under § 124.12, Subpart E, or Subpart F shall contain the following information:

(i) Reference to the date of previous public notices relating to the permit;

(ii) Date, time, and place of the hearing;

(iii) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures; and

(iv) For 404 permits only, a summary of major issues raised to date during the public comment period.

(e) *(Applicable to State programs, see § 123.7).* In addition to the general public notice described in paragraph (d)(1) of this section, all persons identified in paragraphs (c)(1) (i), (ii), (iii), and (iv) of this section shall be mailed a copy of the fact sheet or statement of basis (for EPA-issued permits), the permit application (if any) and the draft permit (if any).

§ 124.11 Public comments and requests for public hearings.

(Applicable to State programs, see § 123.7.)

During the public comment period provided under § 124.10, any interested person may submit written comments on the draft permit or the permit application for 404 permits when no draft permit is required (see § 123.100) and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in § 124.17.

§ 124.12 Public hearings.

(a) *(Applicable to State programs, see § 123.7.)* The Director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s). The Director also may hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision. Public notice of the hearing shall be given as specified in § 124.10.

(b) Whenever a public hearing will be held and EPA is the permitting authority, the Regional Administrator shall designate a Presiding Officer for the hearing who shall be responsible for its scheduling and orderly conduct.

(c) Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under § 124.10 shall automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(d) A tape recording or written transcript of the hearing shall be made available to the public.

(e) At his or her discretion, the Regional Administrator may specify that RCRA and UIC permits be processed under the procedures in Subpart F.

§ 124.13 Obligation to raise issues and provide information during the public comment period.

All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Director's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments and factual grounds supporting their position, including all supporting material, by the close of the public comment period (including any public hearing) under § 124.10. All supporting materials shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. Commenters shall make supporting material not already included in the administrative record available to EPA as directed by the Regional Administrator. (A comment period longer than 30 days will often be necessary in complicated proceedings to give commenters a reasonble opportunity to comply with the requirements of this section. Commenters may request longer comment periods and they should be freely established under § 124.10 to the extent they appear necessary.)

§ 124.14 Reopening of the public comment period.

(a) If any data information or arguments submitted during the public comment period, including information or arguments required under § 124.13, appear to raise substantial new questions concerning a permit, the Regional Administrator may take one or more of the following actions:

(1) Prepare a new draft permit, appropriately modified, under § 124.6;

(2) Prepare a revised statement of basis under § 124.7, a fact sheet or revised fact sheet under § 124.8 and reopen the comment period under § 124.14; or

(3) Reopen or extend the comment period under § 124.10 to give interested persons an opportunity to comment on the information or arguments submitted.

(b) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under § 124.10 shall define the scope of the reopening.

(c) For RCRA, UIC, or NPDES permits, the Regional Administrator may also, in the circumstances described above, elect to hold further proceedings under Subpart F. This decision may be combined with any of the actions enumerated in paragraph (a) of this section.

(d) Public notice of any of the above actions shall be issued under § 124.10.

§ 124.15 Issuance and effective date of permit.

(a) After the close of the public comment period under § 124.10 on a draft permit, the Regional Administrator shall issue a final permit decision. The Regional Administrator shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision on a RCRA, UIC, or PSD permit or for contesting a decision on an NPDES permit or a decision to terminate a RCRA permit. For the purposes of this section, a final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.

(b) A final permit decision shall become effective 30 days after the service of notice of the decision under paragraph (a) of this section, unless:

(1) A later effective date is specified in the decision; or

(2) Review is requested under § 124.19 (RCRA, UIC, and PSD permits) or an evidentiary hearing is requested under § 124.74 (NPDES permit and RCRA permit terminations); or

(3) No comments requested a change in the draft permit, in which case the permit shall become effective immediately upon issuance.

§ 124.16 Stays of contested permits conditions.

(a) *Stays.* (1) If a request for review of a RCRA or UIC permit under § 124.19 or an NPDES permit under § 124.74 or § 124.114 is granted or if conditions of a RCRA or UIC permit are consolidated for reconsideration in an evidentiary hearing on an NPDES permit under §§ 124.74, 124.82 or 124.114, the effect of the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. (No stay of a PSD permit is available under this section.) If the permit involves a new facility or new injection well, new source, new discharger or a recommencing discharger, the applicant shall be without a permit for the proposed new facility, injection well, source or discharger pending final agency action. See also § 124.60.

(2) Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. Stayed provisions of permits for existing facilities, injection wells, and sources shall be identified by the Regional Administrator. All other provisions of the permit for the existing facility, injection well, or source shall remain fully effective and enforceable.

(b) *Stays based on cross effects.* (1) A stay may be granted based on the grounds that an appeal to the Administrator under § 124.19 of one permit may result in changes to another EPA-issued permit only when each of the permits involved has been appealed to the Administrator and he or she has accepted each appeal.

(2) No stay of an EPA-issued RCRA, UIC, or NPDES permit shall be granted based on the staying of any State-issued permit except at the discretion of the Regional Administrator and only upon written request from the State Director.

(c) Any facility or activity holding an existing permit must:

(1) Comply with the conditions of that permit during any modification or revocation and reissuance proceeding under § 124.5; and

(2) To the extent conditions of any new permit are stayed under this section, comply with the conditions of the existing permit which correspond to the stayed conditions, unless compliance with the existing conditions would be technologically incompatible with compliance with other conditions of the new permit which have not been stayed.

§ 124.17 Response to comments.

(a) *(Applicable to State programs, see § 123.7).* At the time that any final permit decision is issued under § 124.15, the Director shall issue a response to comments. States are only required to issue a response to comments when a final permit is issued. This response shall:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(2) Briefly describe and respond to all significant comments on the draft permit or the permit application (for section 404 permits only) raised during the public comment period, or during any hearing.

(b) For EPA-issued permits, any documents cited in the response to comments shall be included in the administrative record for the final permit decision as defined in § 124.18. If new points are raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new materials to the administrative record.

(c) *(Applicable to State programs, see § 123.7).* The response to comments shall be available to the public.

§ 124.18 Administrative record for final permit when EPA is the permitting authority.

(a) The Regional Administrator shall base final permit decisions under § 124.15 on the administrative record defined in this section.

(b) The administrative record for any final permit shall consist of the administrative record for the draft permit and:

(1) All comments received during the public comment period provided under § 124.10 (including any extension or reopening under § 124.14);

(2) The tape or transcript of any hearing(s) held under § 124.12;

(3) Any written materials submitted at such a hearing;

(4) The response to comments required by § 124.17 and any new material placed in the record under that section;

(5) For NPDES new source permits only, any final environmental impact statement and any supplement to the final EIS;

(6) Other documents contained in the supporting file for the permit; and

(7) The final permit.

(c) The additional documents required under paragraph (b) of this section should be added to the record as soon as possible after their receipt or publication by the Agency. The record shall be complete on the date the final permit is issued.

(d) This section applies to all final RCRA, UIC, PSD, and NPDES permits when the draft permit was subject to the administrative record requirements of § 124.9 and to all NPDES permits when the draft permit was included in a public notice after October 12, 1979.

(e) Material readily available at the issuing Regional Office, or published materials which are generally available and which are included in the administrative record under the standards of this section or of § 124.17 ("Response to comments"), need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments.

§ 124.19 Appeal of RCRA, UIC, and PSD permits.

(a) Within 30 days after a RCRA, UIC, or PSD final permit decision has been issued under § 124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision. The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:

(1) A finding of fact or conclusion of law which is clearly erroneous, or

(2) An exercise of discretion or an important policy consideration which the Administrator should, in his or her discretion, review.

(b) The Administrator may also decide on his or her initiative to review any condition of any RCRA, UIC, or PSD permit issued under this Part. The Administrator must act under this paragraph within 30 days of the service date of notice of the Regional Administrator's action.

(c) Within a reasonable time following the filing of the petition for review, the Administrator shall issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Administrator under paragraph (a) or (b) of this section shall be given as provided in §124.10. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to the person(s) requesting review.

(d) The Administrator may defer consideration of an appeal of a RCRA or UIC permit under this section until the completion of formal proceedings under Subpart E or F relating to an NPDES permit issued to the same facility or activity upon concluding that:

(1) The NPDES permit is likely to raise issues relevant to a decision of the RCRA or UIC appeals;

(2) The NPDES permit is likely to be appealed; and

(3) Either: (i) The interests of both the facility or activity and the public are not likely to be materially adversely affected by the deferral; or

(ii) Any adverse effect is outweighed by the benefits likely to result from a consolidated decision on appeal.

(e) A petition to the Administrator under paragraph (a) of this section is, under 5 U.S.C. § 704, a prerequisite to the seeking of judicial review of the final agency action.

(f)(1) For purposes of judicial review under the appropriate Act, final agency action occurs when a final RCRA, UIC, or PSD permit is issued or denied by EPA and agency review procedures are exhausted. A final permit decision shall be issued by the Regional Administrator: (i) When the Administrator issues notice to the parties that review has been denied; (ii) when the Administrator issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or (iii) upon the completion of remand proceedings if the proceedings are remanded, unless the Administrator's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(2) Notice of any final agency action regarding a PSD permit shall promptly be published in the Federal Register.

§ 124.20 Computation of time.

(a) Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.

(b) Any time period scheduled to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event.

(c) If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.

(d) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.

§ 124.21 Effective date of Part 124.

(a) Except for paragraphs (b) and (c) of this section, Part 124 will become effective July 18, 1980. Because this effective date will precede the processing of any RCRA or UIC permits, Part 124 will apply in its entirety to all RCRA and UIC permits.

(b) All provisions of Part 124 pertaining to the RCRA program will become effective on November 19, 1980.

(c) All provisions of Part 124 pertaining to the UIC program will become effective July 18, 1980, but shall not be implemented until the effective date of 40 CFR Part 146.

(d) This Part does not significantly change the way in which NPDES permits are processed. Since October 12, 1979, NPDES permits have been the subject to almost identical requirements in the revised NPDES regulations which were promulgated on June 7, 1979. See *44 FR 32948*. To the extent this Part changes the revised NPDES permit regulations, those changes will take effect as to all permit proceedings in progress on July 3, 1980.

(e) This Part also does not significantly change the way in which PSD permits are processed. For the most part, these regulations will also apply to PSD proceedings in progress on July 18, 1980. However, because it would be disruptive to require retroactively a formal administrative record for PSD permits issued without one, §§ 124.9 and 124.18 will apply to PSD permits for which draft permits were prepared after the effective date of these regulations.

Subpart B—Specific Procedures Applicable to RCRA Permits [Reserved]

Subpart C—Specific Procedures Applicable to PSD Permits

§ 124.41 Definitions applicable to PSD permits.

Whenever PSD permits are processed under this Part, the following terms shall have the following meanings:

"Administrator," "EPA," and "Regional Administrator" shall have the meanings set forth in § 122.3, except when EPA has delegated authority to administer those regulations to another agency under the applicable subsection of 40 CFR § 52.21, the term "EPA" shall mean the delegate agency and the term "Regional Administrator" shall mean the chief administrative officer of the delegate agency.

"Application" means an application for a PSD permit.

"Appropriate Act and Regulations" means the Clean Air Act and applicable regulations promulgated under it.

"Approved program" means a State implementation plan providing for issuance of PSD permits which has been approved by EPA under the Clean Air Act and 40 CFR Part 51. An "approved State" is one administering an "approved program." "State Director" as used in § 124.4 means the person(s) responsible for issuing PSD permits under an approved program, or that person's delegated representative.

"Construction" has the meaning given in 40 CFR § 52.21.

"Director" means the Regional Administrator.

"Draft permit" shall have the meaning set forth in § 122.3.

"Facility or activity" means a "major PSD stationary source" or "major PSD modification."

"Federal Land Manager" has the meaning given in 40 CFR § 52.21.

"Indian Governing Body" has the meaning given in 40 CFR § 52.21.

"Major PSD modification" means a "major modification" as defined in 40 CFR § 52.21.

"Major PSD stationary source" means a "major stationary source" as defined in 40 CFR § 52.21(b)(1).

"Owner or operator" means the owner or operator of any facility or activity subject to regulation under 40 CFR § 52.21 or by an approved State.

"Permit" or "PSD permit" means a permit issued under 40 CFR § 52.21 or by an approved State.

"Person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent or employee thereof.

"Regulated activity" or "activity subject to regulation" means a "major PSD stationary source" or "major PSD modification."

"Site" means the land or water area upon which a "major PSD stationary source" or "major PSD modification" is physically located or conducted, including but not limited to adjacent land used for utility systems: as repair, storage, shipping or processing areas; or otherwise in connection with the "major PSD stationary source" or "major PSD modification."

"State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

§ 124.42 Additional procedures for PSD permits affecting Class I areas.

(a) The Regional Administrator shall provide notice of any permit application for a proposed major PSD stationary source or major PSD modification the emissions from which would affect a Class I area to the Federal Land Manager, and the Federal official charged with direct responsibility for management of any lands within such area. The Regional Administrator shall provide such notice promptly after receiving the application.

(b) Any demonstration which the Federal Land Manager wishes to present under 40 CFR § 52.21(q)(3), and any variances sought by an owner or operator under § 52.21(q)(4) shall be requested in writing, together with any necessary supporting analysis, by the end of the public comment period under §§ 124.10 or 124.118. (40 CFR § 52.21(q)(3) provides for denial of a PSD permit to a facility or activity when the Federal Land Manager demonstrates that its emissions would adversely affect a Class I area even though the applicable increments would not be exceeded. 40 CFR § 52.21(q)(4) conversely authorizes EPA, with the concurrence of the Federal Land Manager and State responsible, to grant certain variances from the otherwise applicable emission limitations to a facility or activity whose emissions would affect a Class I area.)

(c) Variances authorized by 40 CFR § 52.21(q)(5) through (q)(7) shall be handled as specified in those subparagraphs and shall not be subject to this Part. Upon receiving appropriate documentation of a variance properly granted under any of these provisions, the Regional Administrator shall enter the variance in the administrative record. Any decisions later made in proceedings under this Part concerning that permit shall be consistent with the conditions of that variance.

Subpart D—Specific Procedures Applicable to NPDES Permits

§ 124.51 Purpose and scope.

(a) This Subpart sets forth additional requirements and procedures for decisionmaking for the NPDES program.

(b) Decisions on NPDES variance requests ordinarily will be made during the permit issuance process. Variances and other changes in permit conditions ordinarily will be decided through the same notice-and-comment and hearing procedures as the basic permit.

§ 124.52 Permits required on a case-by-case basis.

(a) Various sections of Part 122, Subpart D allow the Director to determine, on a case-by-case basis, that certain concentrated animal feeding operations (§ 122.54), concentrated aquatic animal production facilities (§ 122.55), separate storm sewers (§ 122.57), and certain other facilities covered by general permits (§ 122.59) that do not generally require an individual permit may be required to obtain an individual permit because of their contribution to water pollution.

(b) Whenever the Regional Administrator decides that an individual permit is required under this section, the Regional Administrator shall notify the discharger in writing of that decision and the reasons for it, and shall send an application form with the notice. The discharger must apply for a permit under § 122.53 within 60 days of notice. The question whether the initial designation was proper will remain open for consideration during the public comment period under § 124.11 or § 124.118 and in any subsequent hearing.

§ 124.53 State certification.

(a) Under CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate.

(b) Applications received without a State certification shall be forwarded by the Regional Administrator to the certifying State agency with a request that certification be granted or denied.

(c) If State certification has not been received by the time the draft permit is prepared, the Regional Administrator shall send the certifying State agency:

(1) A copy of a draft permit;

(2) A statement that EPA cannot issue or deny the permit until the certifying State agency has granted or denied certification under § 124.55, or waived its right to certify; and

(3) A statement that the State will be deemed to have waived its right to certify unless that right is exercised within a specified reasonable time not to exceed 60 days from the date the draft permit is mailed to the certifying State agency unless the Regional Administrator finds that unusual circumstances require a longer time.

(d) State certification shall be granted or denied within the reasonable time specified under paragraph (c)(3) of this section. The State shall send a notice of its action, including a copy of any certification, to the applicant and the Regional Administrator.

(e) State certification shall be in writing and shall include:

(1) Conditions which are necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law;

(2) When the State certifies a draft permit instead of a permit application, any conditions more stringent than those in the draft permit which the State finds necessary to meet the requirements listed in paragraph (e)(1) of this section. For each more stringent condition, the certifying State agency shall cite the CWA or State law references upon which that condition is based. Failure to provide such a citation waives the right to certify with respect to that condition; and

(3) A statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards. Failure to provide this statement for any condition waives the right to certify or object to any less stringent condition which may be established during the EPA permit issuance process.

§ 124.54 Special provisions for State certification and concurrence on applications for section 301(h) variances.

(a) When an application for a permit incorporating a variance request under CWA section 301(h) is submitted to a State, the appropriate State official shall either:

(1) Deny the request for the CWA section 301(h) variance (and so notify the applicant and EPA) and, if the State is an approved NPDES State and the permit is due for reissuance, process the permit application under normal procedures; or

(2) Forward a certification meeting the requirements of § 124.53 to the Regional Administrator.

(b) When EPA issues a tentative decision on the request for a variance under CWA section 301(h), and no certification has been received under paragraph (a) of this section, the Regional Administrator shall forward the tentative decision to the State in accordance with § 124.53(b) specifying a reasonable time for State certification and concurrence. If the State fails to deny or grant certification and concurrence under paragraph (a) of this section within such reasonable time, certification shall be waived and the State shall be deemed to have concurred in the issuance of a CWA section 301(h) variance.

(c) Any certification provided by a State under paragraph (a)(2) of this section shall constitute the State's concurrence (as required by section 301(h)) in the issuance of the permit incorporating a section 301(h) variance subject to any conditions specified therein by the State. CWA section 301(h) certification and concurrence under this section will not be forwarded to the State by EPA for recertification after the permit issuance process; States must specify any conditions required by State law, including water quality standards, in the initial certification.

§ 124.55 Effect of State certification.

(a) When certification is required under CWA section 401(a)(1) no final permit shall be issued:

(1) If certification is denied, or

(2) Unless the final permit incorporates the requirements specified in the certification under § 124.53 (d)(1) and (2).

(b) If there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification, a State which has issued a certification under § 124.53 may issue a modified certification or notice of waiver and forward it to EPA. If the modified certification is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. If the certification or notice of waiver is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.

(c) A State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition. The Regional Administrator shall disregard any such certification conditions, and shall consider those conditions or denials as waivers of certification.

(d) A condition in a draft permit may be changed during agency review in any manner consistent with a certification meeting the requirements of § 124.53(d). No such changes shall require EPA to submit the permit to the State for recertification.

(e) Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this Part.

(f) Nothing in this section shall affect EPA's obligation to comply with § 122.12. See CWA section 301(b)(1)(C).

§ 124.56 Fact sheets.

(*Applicable to State programs, see § 123.7.*)

In addition to meeting the requirements of § 124.8, NPDES fact sheets shall contain the following:

(a) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guideline or performance standard provisions as required under § 122.52 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed;

(b)(1) When the draft permit contains any of the following conditions, an explanation of the reasons why such conditions are applicable:

(i) Limitations to control toxic pollutants under § 122.62(e);

(ii) Limitations on internal wastestreams under § 122.63(i); or

(iii) Limitations on indicator pollutants under § 125.3(g).

(2) For every permit to be issued to a treatment works owned by a person other than a State or municipality, an explanation of the Director's decision on regulation of users under § 122.62(m).

(c) When appropriate, a sketch or detailed description of the location of the discharge described in the application; and

(d) For EPA-issued NPDES permits, the requirements of any State certification under § 124.53.

§ 124.57 Public notice.

(a) *Section 316(a) requests (applicable to State programs, see § 123.7).* In addition to the information required under § 124.10(d)(1), public notice of an NPDES draft permit for a discharge where a CWA section 316(a) request has been filed under § 122.53(i) shall include:

(1) A statement that the thermal component of the discharge is subject to effluent limitations under CWA sections 301 or 306 and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under section 301 or 306; and

(2) A statement that a section 316(a) request has been filed and that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge under section 316(a) and a brief description, including a quantitative statement, of the alternative effluent limitations, if any, included in the request.

(3) If the applicant has filed an early screening request under § 125.72 for a section 316(a) variance, a statement that the applicant has submitted such a plan.

(b) *Evidentiary hearings under Subpart E.* In addition to the information required under § 124.10(d)(2), public notice of a hearing under Subpart E shall include:

(1) Reference to any public hearing under § 124.12 on the disputed permit;

(2) Name and address of the person(s) requesting the evidentiary hearing;

(3) A statement of the following procedures:

(i) Any person seeking to be a party must file a request to be admitted as a party to the hearing within 15 days of the date of publication of the notice;

(ii) Any person seeking to be a party may, subject to the requirements of § 124.76, propose material issues of fact or law not already raised by the original requester or another party;

(iii) The conditions of the permit(s) at issue may be amended after the evidentiary hearing and any person interested in those permit(s) must request to be a party in order to preserve any right to appeal or otherwise contest the final administrative decision.

(c) *Non-adversary panel procedures under Subpart F.* (1) In addition to the information required under § 124.10(d)(2), mailed public notice of a draft permit to be processed under Subpart F shall include a statement that any hearing shall be held under Subpart F (panel hearing).

(2) Mailed public notice of a panel hearing under Subpart F shall include:

(i) Name and address of the person requesting the hearing, or a statement that the hearing is being held by order of the Regional Administrator, and the name and address of each known party to the hearing;

(ii) A statement whether the recommended decision will be issued by the Presiding Officer or by the Regional Administrator;

(iii) The due date for filing a written request to participate in the hearing under § 124.117; and

(iv) The due date for filing comments under § 124.118.

§ 124.58 Special procedures for EPA-issued general permits for point sources other than separate storm sewers.

(a) The Regional Administrator shall send a copy of the draft general permit and the administrative record to the Deputy Assistant Administrator for Water Enforcement during the public comment period.

(b) The Deputy Assistant Administrator for Water Enforcement shall have 30 days from receipt of the draft general permit, or shall have until the end of the public comment period, whichever is later, to comment upon, object to, or make recommendations with respect to the draft general permit.

(c) If the Deputy Assistant Administrator for Water Enforcement objects to a draft general permit within the period specified in paragraph (b) of this section, the Regional Administrator shall not issue the final general permit until the Deputy Assistant Administrator for Water Enforcement concurs in writing with the conditions of the general permit.

§ 124.59 Conditions requested by the Corps of Engineers and other government agencies.

(*Applicable to State programs, see § 123.7.*)

(a) If during the comment period for an NPDES draft permit, the District Engineer advises the Director in writing that anchorage and navigation of any of the waters of the United States would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the District Engineer advised the Director that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the Director shall include the specified conditions in the permit. Review or appeal of denial of a permit or of conditions specified by the District Engineer shall be made through the applicable procedures of the Corps of Engineers, and may not be made through the procedures provided in this Part. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall considered stayed in the NPDES permit for the duration of that stay.

(b) If during the comment period the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any other State or Federal agency with jurisdiction over fish, wildlife, or public health advises the Director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of fish, shellfish, or wildlife resources, the Director may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of § 122.12 and of the CWA.

(c) In appropriate cases the Director may consult with one or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the statement of basis, the fact sheet, or the draft permit.

§ 124.60 Issuance and effective date and stays of NPDES permits.

In addition to the requirements of § 124.15, the following provisions apply to NPDES permits and to RCRA or UIC permits to the extent those permits may have been consolidated with an NPDES permit in a formal hearing:

(a)(1) If a request for a formal hearing is granted under §124.75 or § 124.114 regarding the initial permit issued for a new source, a new discharger, or a recommencing discharger, or if a petition for review of the denial of a request for a formal hearing with respect to such a permit is timely filed with the Administrator under § 124.91, the applicant shall be without a permit pending final Agency action under § 124.91.

(2) Wherever a source subject to this paragraph has received a final permit under § 124.15 which is the subject of a hearing request under § 124.74 or a formal hearing under § 124.75, the Presiding Officer, on motion by the source, may issue an order authorizing it to begin operation before final agency action if it complies with all conditions of that final permit during the period until final agency action. The Presiding Officer may grant such a motion in any case where no party opposes it, or, if a party opposes the motion, where the source demonstrates that (i) it is likely to prevail on the merits; (ii) irreparable harm to the environment will not result pending final agency action if it is allowed to commence operations before final agency action; and (iii) the public interest requires that the source be allowed to commence operations. All the conditions of any permit covered by that order shall be fully effective and enforceable.

(b) The Regional Administrator, at any time prior to the rendering of an initial decision in a formal hearing on a permit, may withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this Part. Any portions of the permit which are not withdrawn and which are not stayed under this section shall remain in effect.

(c)(1) If a request for a formal hearing is granted in whole or in part under § 124.75 regarding a permit for an existing source, or if a petition for review of the denial of a request for a formal hearing with respect to that permit is timely filed with the Administrator under § 124.91, the force and effect of the contested conditions of the final permit shall be stayed. The Regional Administrator shall notify, in accordance with § 124.75, the discharger and all parties of the uncontested conditions of the final permit that are enforceable obligations of the discharger.

(2) When effluent limitations are contested, but the underlying control technology is not, the notice shall identify the installation of the technology in accordance with the permit compliance schedules (if uncontested) as an uncontested, enforceable obligation of the permit.

(3) When a combination of technologies is contested, but a portion of the combination is not contested, that portion shall be identified as uncontested if compatible with the combination of technologies proposed by the requester.

(4) Uncontested conditions, if inseverable from a contested condition, shall be considered contested.

(5) Uncontested conditions shall become enforceable 30 days after the date of notice under paragraph (c)(1) of this section granting the request. If, however, a request for a formal hearing on a condition was denied and the denial is appealed under § 124.91, then that condition shall become enforceable upon the date of the notice of the Administrator's decision on the appeal if the denial is affirmed, or shall be stayed, in accordance with this section, if the Administrator reverses the denial and grants the evidentiary hearing.

(6) Uncontested conditions shall include:

(i) Preliminary design and engineering studies or other requirements necessary to achieve the final permit conditions which do not entail substantial expenditures;

(ii) Permit conditions which will have to be met regardless of which party prevails at the evidentiary hearing;

(iii) When the discharger proposed a less stringent level of treatment than that contained in the final permit, any permit conditions appropriate to meet the levels proposed by the discharger, if the measures required to attain that less stringent level of treatment are consistent with the measures required to attain the limits proposed by any other party; and

(iv) Construction activities, such as segregation of waste streams or installation of equipment, which would partially meet the final permit conditions and could also be used to achieve the discharger's proposed alternative conditions.

(d) If at any time after a hearing is granted and after the Regional Administrator's notice under paragraph (c)(1) of this section it becomes clear that a permit requirement is no longer contested, any party may request the Presiding Officer to issue an order identifying the requirements as uncontested. The requirement identified in such order shall become enforceable 30 days after the issuance of the order.

(e) When a formal hearing is granted under § 124.75 on an application for a renewal of an existing permit, all provisions of the existing permit as well as uncontested provisions of the new permit, shall continue fully enforceable and effective until final agency action under § 124.91. (See § 122.5) Upon written request from the applicant, the Regional Administrator may delete requirements from the existing permit which unnecessarily duplicate uncontested provisions of the new permit.

(f) When issuing a finally effective NPDES permit the conditions of which were the subject of a formal hearing under Subparts E or F, the Regional Administrator shall extend the permit compliance schedule to the extent required by a stay under this section provided that no such extension shall be granted which would:

(1) Result in the violation of an applicable statutory deadline; or

(2) Cause the permit to expire more than 5 years after issuance under § 124.15(a).

[Note.—Extensions of compliance schedules under § 124.60(f)(2) will not automatically be granted for a period equal to the period the stay is in effect for an effluent limitation. For example, if both the Agency and the discharger agree that a certain treatment technology is required by the CWA where guidelines do not apply, but a hearing is granted to consider the effluent limitations which the technology will achieve, requirements regarding installation of the underlying technology will not be stayed during the hearing. Thus, unless the hearing extends beyond the final compliance date in the permit, it will not ordinarily be necessary to extend the compliance schedule. However, when application of an underlying technology is challenged, the stay for installation requirements relating to that technology would extend for the duration of the hearing.]

(g) For purposes of judicial review under CWA section 509(b), final agency action on a permit does not occur unless and until a party has exhausted its administrative remedies under Subparts E and F and § 124.91. Any party which neglects or fails to seek review under § 124.91 thereby waives its opportunity to exhaust available agency remedies.

§ 124.61 Final environmental impact statement.

No final NPDES permit for a new source shall be issued until at least 30 days after the date of issuance of a final environmental impact statement if one is required under 40 CFR § 6.605.

§ 124.62 Decision on variances.

(*Applicable to State programs, see § 123.7.*)

(a) The Director may grant or deny requests for the following variances (subject to EPA objection under § 123.75 for State permits):

(1) Extensions under CWA section 301(i) based on delay in completion of a publicly owned treatment works;

(2) After consultation with the Regional Administrator, extensions under CWA section 301(k) based on the use of innovative technology; or

(3) Variances under CWA section 316(a) for thermal pollution.

(b) The State Director may deny, or forward to the Regional Administrator with a written concurrence, or submit to EPA without recommendation a completed request for:

(1) A variance based on the presence of "fundamentally different factors" from those on which an effluent limitations guideline was based;

(2) A variance based on the economic capability of the applicant under CWA section 301(c);

(3) A variance based upon certain water quality factors under CWA section 301(g); or

(4) A variance based on water quality related effluent limitations under CWA section 302(b)(2).

(c) The Regional Administrator may deny, forward, or submit to the EPA Deputy Assistant Administrator for Water Enforcement with a recommendation for approval, a request for a variance listed in paragraph (b) of this section that is forwarded by the State Director, or that is submitted to the Regional Administrator by the requester where EPA is the permitting authority.

(d) The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance request submitted under paragraph (c) of this section. If the Deputy Assistant Administrator approves the variance, the Director may prepare a draft permit incorporating the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under § 124.54.

§ 124.63 Procedures for variances when EPA is the permitting authority.

(a) In States where EPA is the permit issuing authority and a request for a variance is filed as required by § 122.53, the request shall be processed as follows:

(1) If at the time that a request for a variance is submitted the Regional Administrator has received an application under § 124.3 for issuance or renewal of that permit but has not yet prepared a draft permit under § 124.6 covering the discharge in question, the Regional Administrator, after obtaining any necessary concurrence of the EPA Deputy Assistant Administrator for Water Enforcement under § 124.62, shall give notice of a tentative decision on the request at the time the notice of the draft permit is prepared as specified in § 124.10, unless this would significantly delay the processing of the permit. In that case the processing of the variance request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the processing of the permit shall proceed without delay.

(2) If at the time that a request for a variance is filed the Regional Administrator has given notice under § 124.10 of a draft permit covering the discharge in question, but that permit has not yet become final, administrative proceedings concerning that permit may be stayed and the Regional Administrator shall prepare a new draft permit including a tentative decision on the request, and the fact sheet required by § 124.8. However, if this will significantly delay the processing of the existing draft permit or the Regional Administrator, for other reasons,

considers combining the variance request and the existing draft permit inadvisable, the request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the administrative disposition of the existing draft permit shall proceed without delay.

(3) If the permit has become final and no application under § 124.3 concerning it is pending or if the variance request has been separated from a draft permit as described in paragraphs (a) (1) and (2) of this section, the Regional Administrator may prepare a new draft permit and give notice of it under § 124.10. This draft permit shall be accompanied by the fact sheet required by § 124.8 except that the only matters considered shall relate to the requested variance.

§ 124.64 Appeals of variances.

(a) When a State issues a permit on which EPA has made a variance decision, separate appeals of the State permit and of the EPA variance decision are possible. If the owner or operator is challenging the same issues in both proceedings, the Regional Administrator will decide, in consultation with State officials, which case will be heard first.

(b) Variance decisions made by EPA may be appealed under either Subparts E or F, provided the requirements of the applicable Subpart are met. However, whenever the basic permit decision is eligible only for an evidentiary hearing under Subpart E while the variance decision is eligible only for a panel hearing under Subpart F, the issues relating to both the basic permit decision and the variance decision shall be considered in the Subpart E proceeding. No Subpart F hearing may be held if a Subpart E hearing would be held in addition. See § 124.111(b).

(c) *Stays for section 301(g) variances.* If a request for an evidentiary hearing is granted on a variance requested under CWA section 301(g), or if a petition for review of the denial of a request for the hearing is filed under § 124.91, any otherwise applicable standards and limitations under CWA section 301 shall not be stayed unless:

(1) In the judgment of the Regional Administrator, the stay or the variance sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity, or synergistic propensities; and

(2) In the judgment of the Regional Administrator, there is a substantial likelihood that the discharger will succeed on the merits of its appeal; and

(3) The discharger files a bond or other appropriate security which is required by the Regional Administrator to assure timely compliance with the requirements from which a variance is sought in the event that the appeal is unsuccessful.

(d) Stays for variances other than section 301(g) are governed by § 124.60.

§ 124.65 Special procedures for discharge into marine waters section 301(h).

(a) Where it is clear on the face of a section 301(h) request that the discharger is not entitled to a variance, the request shall be denied.

(b) In the case of all other section 301(h) requests the Administrator, or a person designated by the Administrator, may either:

(1) Give written authorization to a requester to submit information required by Part 125, Subpart G or the final request by a date certain, not to exceed 9 months, if:

(i) The requester proposes to submit new or additional information and the request demonstrates that:

(A) The requester made consistent and diligent efforts to obtain such information prior to submitting the final request;

(B) The failure to obtain such information was due to circumstances beyond the control of the requester; and

(C) Such information can be submitted promptly; or

(ii) The requester proposes to submit minor corrective information and such information can be submitted promptly; or

(2) Make a written request of a requester to submit additional information by a certain date, not to exceed 9 months, if such information is necessary to issue a tentative decision under § 124.62(a)(1).

All additional information submitted under this paragraph which is timely received, shall be considered part of the original request.

(c) The otherwise applicable sections of this Part apply to draft permits incorporating section 301(h) variance, except that because 301(h) permits may only be issued by EPA, the terms "Administrator or a person designated by the Regional Administrator" shall be substituted for the term "Director" as appropriate.

(d) No permit subject to a 301(h) variance shall be issued unless the appropriate State officials have concurred or waived concurrence pursuant to § 124.54. In the case of a permit issued to a requester in an approved State, the State Director may:

(1) Revoke any existing permit as of the effective date of the EPA-issued permit subject to a 301(h) variance; and

(2) Co-sign the permit subject to the 301(h) variance, if the Director has indicated an intent to do so in the written concurrence

§ 124.66 Special procedures for decisions on thermal variances under section 316(a).

(a) Except as provided in § 124.65, the only issues connected with issuance of a particular permit on which EPA will make a final Agency decision before the final permit is issued under §§ 124.15 and 124.60 are whether alternative effluent limitations would be justified under CWA section 316(a) and whether cooling water intake structures will use the best available technology under section 316(b). Permit applicants who wish an early decision on these issues should request it and furnish supporting reasons at the time their permit applications are filed under § 122.53. The Regional Administrator will then decide whether or not to make an early decision. If it is granted, both the early decision on CWA section 316 (a) or (b) issues and the grant of the balance of the permit shall be considered permit issuance under these regulations, and shall be subject to the same requirements of public notice and comment and the same opportunity for an evidentiary or panel hearing under Subparts E or F.

(b) If the Regional Administrator, on review of the administrative record, determines that the information necessary to decide whether or not the CWA section 316(a) issue is not likely to be available in time for a decision on permit issuance, the Regional Administrator may issue a permit under § 124.15 for a term up to 5 years. This permit shall require achievement of the effluent limitations initially proposed for the thermal component of the discharge no later than the date otherwise required by law. However, the permit shall also afford the permittee an opportunity to file a demonstration under CWA section 316(a) after conducting such studies as are required under 40 CFR Part 125, Subpart H. A new discharger may not exceed the thermal effluent limitation which is initially proposed unless and until its CWA section 316(a) variance request is finally approved.

(c) Any proceeding held under paragraph (a) of this section shall be publicly noticed as required by § 124.10 and shall be conducted at a time allowing the permittee to take necessary measures to meet the final compliance date in the event its request for modification of thermal limits is denied.

(d) Whenever the Regional Administrator defers the decision under CWA section 316(a), any decision under section 316(b) may be deferred.

Subpart E—Evidentiary Hearings for EPA-Issued NPDES Permits and EPA-Terminated RCRA Permits

§ 124.71 Applicability.

(a) The regulations in this Subpart govern all formal hearings conducted by EPA under CWA section 402, except for those conducted under Subpart F. They also govern all evidentiary hearings conducted under RCRA section 3008 in connection with the termination of a RCRA permit. This includes termination of interim status for failure to furnish information needed to made a final decision. A formal hearing is available to challenge any NPDES permit issued under § 124.15 except for a general permit. Persons affected by a general permit may not challenge the conditions of a general permit as of right in further agency proceedings. They may instead either challenge the general permit in court, or apply for an individual NPDES permit under § 122.53 as authorized in § 122.59 and then request a formal hearing on the issuance or denial of an individual permit. (The Regional Administrator also has the discretion to use the procedures of Subpart F for general permits. See § 124.111.)

(b) In certain cases, evidentiary hearings under this Subpart may also be held on the conditions of UIC permits, or of RCRA permits which are being issued, modified, or revoked and reissued, rather than terminated or suspended. This will occur when the conditions of the UIC or RCRA permit in question are closely linked with the conditions of an NPDES permit as to which an evidentiary hearing has been granted. See § 124.74(b)(2). Any interested person may challenge the Regional Administrator's initial new source determination by requesting an evidentiary hearing under this Part. See § 122.66.

(c) PSD permits may never be subject to an evidentiary hearing under this Subpart. Section 124.74(b)(2)(iv) provides only for consolidation of PSD permits with other permits subject to a panel hearing under Subpart F.

§ 124.72 Definitions.

For the purpose of this Subpart, the following definitions are applicable:

"Hearing Clerk" means The Hearing Clerk, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

"Judicial Officer" means a permanent or temporary employee of the Agency appointed as a Judicial Officer by the Administrator under these regulations and subject to the following conditions:

(a) A Judicial Officer shall be a licensed attorney. A Judicial Officer shall not be employed in the Office of Enforcement or the Office of Water and Waste Management, and shall not participate in the consideration or decision of any case in which he or she performed investigative or prosecutorial functions, or which is factually related to such a case.

(b) The Administrator may delegate any authority to act in an appeal of a given case under this Subpart to a Judicial Officer who, in addition, may perform other duties for EPA, provided that the delegation shall not preclude a Judicial Officer from referring any motion or case to the Administrator when the Judicial Officer decides such action would be appropriate. The Administrator, in deciding a case, may consult with and assign the drafting of preliminary findings of fact and conclusions and/or a preliminary decision to any Judicial Officer.

"Party" means the EPA trial staff under § 124.78 and any person whose request for a hearing under § 124.74 or whose request to be admitted as a party or to intervene under § 124.79 or § 124.117 has been granted.

"Presiding Officer" for the purposes of this Subpart means an Administrative Law Judge appointed under 5 U.S.C. 3105 and designated to preside at the hearing. Under Subpart F other persons may also serve as hearing officers. See § 124.119.

"Regional Hearing Clerk" means an employee of the Agency designated by a Regional Administrator to establish a repository for all books, records, documents, and other materials relating to hearings under this Subpart.

§ 124.73 Filing and submission of documents.

(a) All submissions authorized or required to be filed with the Agency under this Subpart shall be filed with the Regional Hearing Clerk, unless otherwise provided by regulation. Submissions shall be considered filed on the date on which they are mailed or delivered in person to the Regional Hearing Clerk.

(b) All submissions shall be signed by the person making the submission, or by an attorney or other authorized agent or representative.

(c)(1) All data and information referred to or in any way relied upon in any submission shall be included in full and may not be incorporated by reference, unless previously submitted as part of the administrative record in the same proceeding. This requirement does not apply to State or Federal statutes and regulations, judicial decisions published in a national reporter system, officially issued EPA documents of general applicability, and any other generally available reference material which may be incorporated by reference. Any party incorporating materials by reference shall provide copies upon request by the Regional Administrator or the Presiding Officer.

(2) If any part of the material submitted is in a foreign language, it shall be accompanied by an English translation verified under oath to be complete and accurate, together with the name, address, and a brief statement of the qualifications of the person making the translation. Translations of literature or other material in a foreign language shall be accompanied by copies of the original publication.

(3) Where relevant data or information is contained in a document also containing irrelevant matter, either the irrelevant matter shall be deleted or the relevant portions shall be indicated.

(4) Failure to comply with the requirements of this section or any other requirement in this Subpart may result in the noncomplying portions of the submission being excluded from consideration. If the Regional Administrator or the Presiding Officer, on motion by any party or *sua sponte*, determines that a submission fails to meet any requirement of this Subpart, the Regional Administrator or Presiding Officer shall direct the Regional Hearing Clerk to return the submission, together with a reference to the applicable regulations. A party whose materials have been rejected has 14 days to correct the errors and resubmit, unless the Regional Administrator or the Presiding Officer finds good cause to allow a longer time.

(d) The filing of a submission shall not mean or imply that it in fact meets all applicable requirements or that it contains reasonable grounds for the action requested or that the action requested is in accordance with law.

(e) The original of all statements and documents containing factual material, data, or other information shall be signed in ink and shall state the name, address, and the representative capacity of the person making the submission.

§ 124.74 Requests for evidentiary hearing.

(a) Within 30 days following the service of notice of the Regional Administrator's final permit decision under § 124.15, any interested person may submit a request to the Regional Administrator under paragraph (b) of this section for an evidentiary hearing to reconsider or contest that decision. If such a request is submitted by a person other than the permittee, the person shall simultaneously serve a copy of the request on the permittee.

(b)(1) In accordance with § 124.76, such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for adjudication. Information supporting the request or other written documents relied upon to support the request shall be submitted as required by § 124.73 unless they are already part of the administrative record required by § 124.18.

[Note.—This paragraph allows the submission of requests for evidentiary hearings even though both legal and factual issues may be raised, or only legal issues may be raised. In the latter case, because no factual issues were raised, the Regional Administrator would be required to deny the request. However, on review of the denial the Administrator is authorized by § 124.91(a)(1) to review policy or legal conclusions of the Regional Administrator. EPA is requiring an appeal to the Administrator even of purely legal issues involved in a permit decision to ensure that the Administrator will have an opportunity to review any permit before it will be final and subject to judicial review.]

(2) Persons requesting an evidentiary hearing on an NPDES permit under this section may also request an evidentiary hearing on a RCRA or UIC permit. PSD permits may never be made part of an evidentiary hearing under Subpart E. This request is subject to all the requirements of paragraph (b)(1) of this section and in addition will be granted only if:

(i) Processing of the RCRA or UIC permit at issue was consolidated with the processing of the NPDES permit as provided in § 124.4;

(ii) The standards for granting a hearing on the NPDES permit are met;

(iii) The resolution of the NPDES permit issues is likely to make necessary or appropriate modification of the RCRA or UIC permit; and

(iv) If a PSD permit is involved, a permittee who is eligible for an evidentiary hearing under Subpart E on his or her NPDES permit requests that the formal hearing be conducted under the procedures of Subpart F and the Regional Administrator finds that consolidation is unlikely to delay final permit issuance beyond the PSD one-year statutory deadline.

(c) These requests shall also contain:

(1) The name, mailing address, and telephone number of the person making such request;

(2) A clear and concise factual statement of the nature and scope of the interest of the requester;

(3) The names and addresses of all persons whom the requester represents; and

(4) A statement by the requester that, upon motion of any party granted by the Presiding Officer, or upon order of the Presiding Officer *sua sponte* without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;

(ii) All persons represented by the requester; and

(iii) All officers, directors, employees, consultants, and agents of the requester and the persons represented by the requester.

(5) Specific references to the contested permit conditions, as well as suggested revised or alternative permit conditions (including permit denials) which, in the judgment of the requester, would be required to implement the purposes and policies of the CWA.

(6) In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the CWA.

(7) Identification of the permit obligations that are contested or are inseverable from contested conditions and should be stayed if the request is granted by reference to the particular contested conditions warranting the stay.

(8) Hearing requests also may ask that a formal hearing be held under the procedures set forth in Subpart F. An applicant may make such a request even if the proceeding does not constitute "initial licensing" as defined in § 124.111.

(d) If the Regional Administrator grants an evidentiary hearing request, in whole or in part, the Regional Administrator shall identify the permit conditions which have been contested by the requester and for which the evidentiary hearing has been granted. Permit conditions which are not contested or for which the Regional Administrator has denied the hearing request shall not be affected by, or considered at, the evidentiary hearing. The Regional Administrator shall specify these conditions in writing in accordance with § 124.60(c).

(e) The Regional Administrator must grant or deny all requests for an evidentiary hearing on a particular permit. All requests that are granted for a particular permit shall be combined in a single evidentiary hearing.

(f) The Regional Administrator (upon notice to all persons who have already submitted hearing requests) may extend the time allowed for submitting hearing requests under this section for good cause.

§ 124.75 Decision on request for a hearing.

(a)(1) Within 30 days following the expiration of the time allowed by § 124.74 for submitting an evidentiary hearing request, the Regional Administrator shall decide the extent to which, if at all, the request shall be granted, provided that the request conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit.

(2) When an NPDES permit for which a hearing request has been granted constitutes "initial licensing" under § 124.111, the Regional Administrator may elect to hold a formal hearing under the procedures of Subpart F rather than under the procedures of this Subpart even if no person has requested that Subpart F be applied. If the Regional Administrator makes such a decision, he or she shall issue a notice of hearing under § 124.116. All subsequent proceedings shall then be governed by §§ 124.117 through 124.121, except that any reference to a draft permit shall mean the final permit.

(3) Whenever the Regional Administrator grants a request made under § 124.74(c)(8) for a formal hearing under Subpart F on an NPDES permit that does not constitute an initial license under § 124.111, the Regional Administrator shall issue a notice of hearing under § 124.116 including a statement that the permit will be processed under the procedures of Subpart F unless a written objection is received within 30 days. If no valid objection is received, the application shall be processed in accordance with §§ 124.117 through 124.121, except that any reference to a draft permit shall mean the final permit. If a valid objection is received, this Subpart shall be applied instead.

(b) If a request for a hearing is denied in whole or in part, the Regional Administrator shall briefly state the reasons. That denial is subject to review by the Administrator under § 124.91.

§ 124.76 Obligation to submit evidence and raise issues before a final permit is issued.

No evidence shall be submitted by any party to a hearing under this Subpart that was not submitted to the administrative record required by § 124.18 as part of the preparation of and comment on a draft permit, unless good cause is shown for the failure to submit it. No issues shall be raised by any party that were not submitted to the administrative record required by § 124.18 as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them. Good cause includes the case where the party seeking to raise the new issues or introduce new information shows that it could not reasonably have ascertained the issues or made the information available within the time required by § 124.15; or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced. Good cause exists for the introduction of data available on operation authorized under § 124.60(a)(2).

§ 124.77 Notice of hearing.

Public notice of the grant of an evidentiary hearing regarding a permit shall be given as provided in § 124.57(b) and by mailing a copy to all persons who commented on the draft permit, testified at the public hearing, or submitted a request for a hearing. Before the issuance of the notice, the Regional Administrator shall designate the Agency trial staff and the members of the decisional body (as defined in § 124.78).

§ 124.78 Ex parte communications.

(a) For purposes of this section, the following definitions shall apply:

(1) "Agency trial staff" means those Agency employees, whether temporary or permanent, who have been designated by the Agency under § 124.77 or § 124.116 as available to investigate, litigate, and present the evidence, arguments, and position of the Agency in the evidentiary hearing or nonadversary panel hearing. Appearance as a witness does not necessarily require a person to be designated as a member of the Agency trial staff;

(2) "Decisional body" means any Agency employee who is or may reasonably be expected to be involved in the decisional process of the proceeding including the Administrator, Judicial Officer, Presiding Officer, the Regional Administrator (if he or she does not designate himself or herself as a member of the Agency trial staff), and any of their staff participating in the decisional process. In the case of a nonadversary panel hearing, the decisional body shall also include the panel members, whether or not permanently employed by the Agency;

(3) *"Ex parte* communication" means any communication, written or oral, relating to the merits of the proceeding between the decisional body and an interested person outside the Agency or the Agency trial staff which was not originally filed or stated in the administrative record or in the hearing. *Ex parte* communications do not include:

(i) Communications between Agency employees other than between the Agency trial staff and the members of the decisional body;

(ii) Discussions between the decisional body and either:

(A) Interested persons outside the Agency, or

(B) The Agency trial staff, *if* all parties have received prior written notice of the proposed communications and have been given the opportunity to be present and participate therein.

(4) "Interested person outside the Agency" includes the permit applicant, any person who filed written comments in the proceeding, any person who requested the hearing, any person who requested to participate or intervene in the hearing, any participant in the hearing and any other interested person not employed by the Agency at the time of the communications, and any attorney of record for those persons.

(b)(1) No interested person outside the Agency or member of the Agency trial staff shall make or knowingly cause to be made to any members of the decisional body, an *ex parte* communication on the merits of the proceedings.

(2) No member of the decisional body shall make or knowingly cause to be made to any interested person outside the Agency or member of the Agency trial staff, an *ex parte* communication on the merits of the proceedings.

(3) A member of the decisional body who receives or who makes or who knowingly causes to be made a communication prohibited by this subsection shall file with the Regional Hearing Clerk all written communications or memoranda stating the substance of all oral communications together with all written responses and memoranda stating the substance of all oral responses.

(c) Whenever any member of the decisionmaking body receives an *ex parte* communication knowingly made or knowingly caused to be made by a party or representative of a party in violation of this section, the person presiding at the stage of the hearing then in progress may, to the extent consistent with justice and the policy of the CWA, require the party to show cause why its claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(d) The prohibitions of this section begin to apply upon issuance of the notice of the grant of a hearing under § 124.77 or § 124.116. This prohibition terminates at the date of final agency action.

§ 124.79 Additional parties and issues.

(a) Any person may submit a request to be admitted as a party within 15 days after the date of mailing, publication, or posting of notice of the grant of an evidentiary hearing, whichever occurs last. The Presiding Officer shall grant requests that meet the requirements of §§ 124.74 and 124.76.

(b) After the expiration of the time prescribed in paragraph (a) of this section any person may file a motion for leave to intervene as a party. This motion must meet the requirements of §§ 124.74 and 124.76 and set forth the grounds for the proposed intervention. No factual or legal issues, besides those raised by timely hearing requests, may be proposed except for good cause. A motion for leave to intervene must also contain a verified statement showing good cause for the failure to file a timely request to be admitted as a party. The Presiding Officer shall grant the motion only upon an express finding on the record that:

(1) Extraordinary circumstances justify granting the motion;

(2) The intervener has consented to be bound by:

(i) Prior written agreements and stipulations by and between the existing parties; and

(ii) All orders previously entered in the proceedings; and

(3) Intervention will not cause undue delay or prejudice the rights of the existing parties.

§ 124.80 Filing and service.

(a) An original and one (1) copy of all written submissions relating to an evidentiary hearing filed after the notice is published shall be filed with the Regional Hearing Clerk.

(b) The party filing any submission shall also serve a copy of each submission upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

(c) Every submission shall be accompanied by an acknowledgement of service by the person served or a certificate of service citing the date, place, time, and manner of service and the names of the persons served.

(d) The Regional Hearing Clerk shall maintain and furnish a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives to any person upon request.

§ 124.81 Assignment of Administrative Law Judge.

No later than the date of mailing, publication, or posting of the notice of a grant of an evidentiary hearing, whichever occurs last, the Regional Administrator shall refer the proceeding to the Chief Administrative Law Judge who shall assign an Administrative Law Judge to serve as Presiding Officer for the hearing.

§ 124.82 Consolidation and severance.

(a) The Administrator, Regional Administrator, or Presiding Officer has the discretion to consolidate, in whole or in part, two or more proceedings to be held under this Subpart, whenever it appears that a joint hearing on any or all of the matters in issue would expedite or simplify consideration of the issues and that no party would be prejudiced thereby. Consolidation shall not affect the right of any party to raise issues that might have been raised had there been no consolidation.

(b) If the Presiding Officer determines consolidation is not conducive to an expeditious, full, and fair hearing, any party or issues may be severed and heard in a separate proceeding.

§ 124.83 Prehearing conferences.

(a) The Presiding Officer, *sua sponte*, or at the request of any party, may direct the parties or their attorneys or duly authorized representatives to appear at a specified time and place for one or more conferences before or during a hearing, or to submit written proposals or correspond for the purpose of considering any of the matters set forth in paragraph (c) of this section.

(b) The Presiding Officer shall allow a reasonable period before the hearing begins for the orderly completion of all prehearing procedures and for the submission and disposition of all prehearing motions. Where the circumstances warrant, the Presiding Officer may call a prehearing conference to inquire into the use of available procedures contemplated by the parties and the time required for their completion, to establish a schedule for their completion, and to set a tentative date for beginning the hearing.

(c) In conferences held, or in suggestions submitted, under paragraph (a) of this section, the following matters may be considered:

(1) Simplification, clarification, amplification, or limitation of the issues.

(2) Admission of facts and of the genuineness of documents, and stipulations of facts.

(3) Objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits, or other submissions proposed by a party, except that the administrative record required by § 124.19 shall be received in evidence subject to the provisions of § 124.85(d)(2). At any time before the end of the hearing any party may make, and the Presiding Officer shall consider and rule upon, motions to strike testimony or other evidence other than the administrative record on the grounds of relevance, competency, or materiality.

(4) Matters subject to official notice may be taken.

(5) Scheduling as many of the following as are deemed necessary and proper by the Presiding Officer:

(i) Submission of narrative statements of position on each factual issue in controversy;

(ii) Submission of written testimony and documentary evidence (e.g., affidavits, data, studies, reports, and any other type of written material) in support of those statements; or

(iii) Requests by any party for the production of additional documentation, data, or other information relevant and material to the facts in issue.

(6) Grouping participants with substantially similar interests to eliminate redundant evidence, motions, and objections.

(7) Such other matters that may expedite the hearing or aid in the disposition of the matter.

(d) At a prehearing conference or at some other reasonable time set by the Presiding Officer, each party shall make available to all other parties the names of the expert and other witnesses it expects to call. At its discretion or at the request of the Presiding Officer, a party may include a brief narrative summary of any witness's anticipated testimony. Copies of any written testimony, documents, papers, exhibits, or materials which a party expects to introduce into evidence, and the administrative record required by § 124.18 shall be marked for identification as ordered by the Presiding Officer. Witnesses, proposed written testimony, and other evidence may be added or amended upon order of the Presiding Officer for good cause shown. Agency employees and consultants shall be made available as witnesses by the Agency to the same extent that production of such witnesses is required of other parties under § 124.74(c)(4). (See also § 124.85(b)(16).)

(e) The Presiding Officer shall prepare a written prehearing order reciting the actions taken at each prehearing conference and setting forth the schedule for the hearing, unless a transcript has been taken and accurately reflects these matters. The order shall include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith. This order shall control the subsequent course of the hearing unless modified by the Presiding Officer for good cause shown.

§ 124.84 Summary determination.

(a) Any party to an evidentiary hearing may move with or without supporting affidavits and briefs for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination. This motion shall be filed at least 45 days before the date set for the hearing, except that upon good cause shown the motion may be filed at any time before the close of the hearing.

(b) Any other party may, within 30 days after service of the motion, file and serve a response to it or a countermotion for summary determination. When a motion for summary determination is made and supported, a party opposing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact for determination at the hearing.

(c) Affidavits shall be made on personal knowledge, shall set forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(d) The Presiding Officer may set the matter for oral argument and call for the submission of proposed findings, conclusions, briefs, or memoranda of law. The Presiding Officer shall rule on the motion not more than 30 days after the date responses to the motion are filed under paragraph (b) of this section.

(e) If all factual issues are decided by summary determination, no hearing will be held and the Presiding Officer shall prepare an initial decision under § 124.89. If summary determination is denied or if partial summary determination is granted, the Presiding Officer shall issue a memorandum opinion and order, interlocutory in character, and the hearing will proceed on the remaining issues. Appeals from interlocutory rulings are governed by § 124.90.

(f) Should it appear from the affidavits of a party opposing a motion for summary determination that he or she cannot for reasons stated present, by affidavit or otherwise, facts essential to justify his or her opposition, the Presiding Officer may deny the motion or order a continuance to allow additional affidavits or other information to be obtained or may make such other order as is just and proper.

§ 124.85 Hearing procedure.

(a)(1) The permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift.

[Note.—In many cases the documents contained in the administrative record, in particular the fact sheet or statement of basis and the response to comments, should adequately discharge this burden.]

(2) The Agency has the burden of going forward to present an affirmative case in support of any challenged condition of a final permit.

(3) Any hearing participant who, by raising material issues of fact, contends:

(i) That particular conditions or requirements in the permit are improper or invalid, and who desires either:

(A) The inclusion of new or different conditions or requirements; or

(B) The deletion of those conditions or requirements; or

(ii) That the denial or issuance of a permit is otherwise improper or invalid, shall have the burden of going forward to present an affirmative case at the conclusion of the Agency case on the challenged requirement.

(b) The Presiding Officer shall conduct a fair and impartial hearing, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. For these purposes, the Presiding Officer may:

(1) Arrange and issue notice of the date, time, and place of hearings and conferences;

(2) Establish the methods and procedures to be used in the development of the evidence;

(3) Prepare, after considering the views of the participants, written statements of areas of factual disagreement among the participants;

(4) Hold conferences to settle, simplify, determine, or strike any of the issues in a hearing, or to consider other matters that may facilitate the expeditious disposition of the hearing;

(5) Administer oaths and affirmations;

(6) Regulate the course of the hearing and govern the conduct of participants;

(7) Examine witnesses;

(8) Identify and refer issues for interlocutory decision under § 124.90;

(9) Rule on, admit, exclude, or limit evidence;

(10) Establish the time for filing motions, testimony, and other written evidence, briefs, findings, and other submissions;

(11) Rule on motions and other procedural matters pending before him, including but not limited to motions for summary determination in accordance with § 124.84;

(12) Order that the hearing be conducted in stages whenever the number of parties is large or the issues are numerous and complex;

(13) Take any action not inconsistent with the provisions of this Subpart for the maintenance of order at the hearing and for the expeditious, fair, and impartial conduct of the proceeding;

(14) Provide for the testimony of opposing witnesses to be heard simultaneously or for such witnesses to meet outside the hearing to resolve or isolate issues or conflicts;

(15) Order that trade secrets be treated as confidential business information in accordance with § 122.19 and 40 CFR Part 2; and

(16) Allow such cross-examination as may be required for a full and true disclosure of the facts. No cross-examination shall be allowed on questions of policy except to the extent required to disclose the factual basis for permit requirements, or on questions of law, or regarding matters (such as the validity of effluent limitations guidelines) that are not subject to challenge in an evidentiary hearing. No Agency witnesses shall be required to testify or be made available for cross-examination on such matters. In deciding whether or not to allow cross-examination, the Presiding Officer shall consider the likelihood of clarifying or resolving a disputed issue of material fact compared to other available methods. The party seeking cross-examination has the burden of demonstrating that this standard has been met.

(c) All direct and rebuttal evidence at an evidentiary hearing shall be submitted in written form, unless, upon motion and good cause shown, the Presiding Officer determines that oral presentation of the evidence on any particular fact will materially assist in the efficient identification and clarification of the issues. Written testimony shall be prepared in narrative form.

(d)(1) The Presiding Officer shall admit all relevant, competent, and material evidence, except evidence that is unduly repetitious. Evidence may be received at any hearing even though inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given evidence shall be determined by its reliability and probative value.

(2) The administrative record required by § 124.18 shall be admitted and received in evidence. Upon motion by any party the Presiding Officer may direct that a witness be provided to sponsor a portion or portions of the administrative record. The Presiding Officer, upon finding that the standards in § 124.85(b)(3) have been met, shall direct the appropriate party to produce the witness for cross-examination. If a sponsoring witness cannot be provided, the Presiding Officer may reduce the weight accorded the appropriate portion of the record.

[Note.—Receiving the administrative record into evidence automatically serves several purposes: (1) it documents the prior course of the proceeding; (2) it provides a record of the views of affected persons for consideration by the agency decisionmaker; and (3) it provides factual material for use by the decisionmaker.]

(3) Whenever any evidence or testimony is excluded by the Presiding Officer as inadmissible, all such evidence or testimony existing in written form shall remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof, by means of a brief statement on the record describing the testimony excluded.

(4) When two or more parties have substantially similar interests and positions, the Presiding Officer may limit the number of attorneys or other party representatives who will be permitted to cross-examine and to make and argue motions and objections on behalf of those parties. Attorneys may, however, engage in cross-examination relevant to matters not adequately covered by previous cross-examination.

(5) Rulings of the Presiding Officer on the admissibility of evidence or testimony, the propriety of cross-examination, and other procedural matters shall appear in the record and shall control further proceedings, unless reversed as a result of an interlocutory appeal taken under § 124.90.

(6) All objections shall be made promptly or be deemed waived. Parties shall be presumed to have taken exception to an adverse ruling. No objection shall be deemed waived by further participation in the hearing.

§ 124.86 Motions.

(a) Any party may file a motion (including a motion to dismiss a particular claim on a contested issue), with the Presiding Officer on any matter relating to the proceeding. All motions shall be in writing and served as provided in § 124.80 except those made on the record during an oral hearing before the Presiding Officer.

(b) Within 10 days after service of any written motion, any part to the proceeding may file a response to the motion. The time for response may be shortened to 3 days or extended for an additional 10 days by the Presiding Officer for good cause shown.

(c) Notwithstanding § 122.52, any party may file with the Presiding Officer a motion seeking to apply to the permit any regulatory or statutory provision issued or made available after the issuance of the permit under § 124.15. The Presiding Officer shall grant any motion to apply a new statutory provision unless he or she finds it contrary to legislative intent. The Presiding Officer may grant a motion to apply a new regulatory requirement when appropriate to carry out the purpose of CWA, and when no party would be unduly prejudiced thereby.

§ 124.87 Record of hearings.

(a) All orders issued by the Presiding Officer, transcripts of oral hearings or arguments, written statements of position, written direct and rebuttal testimony, and any other data, studies, reports, documentation, information and other written material of any kind submitted in the proceeding shall be a part of the hearing record and shall be available to the public except as provided in § 122.19, in the Office of the Regional Hearing Clerk, as soon as it is received in that office.

(b) Evidentiary hearings shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed. After the hearing, the reporter shall certify and file with the Regional Hearing Clerk:

(1) The original of the transcript, and

(2) The exhibits received or offered into evidence at the hearing.

(c) The Regional Hearing Clerk shall promptly notify each of the parties of the filing of the certified transcript of proceedings. Any party who desires a copy of the transcript of the hearing may obtain a copy of the hearing transcript from the Regional Hearing Clerk upon payment of costs.

(d) The Presiding Officer shall allow witnesses, parties, and their counsel an opportunity to submit such written proposed corrections of the transcript of any oral testimony taken at the hearing, pointing out errors that may have been made in transcribing the testimony, as are required to make the transcript conform to the testimony. Except in unusual cases, no more than 30 days shall be allowed for submitting such corrections from the day a complete transcript of the hearing becomes available.

§ 124.88 Proposed findings of fact and conclusions; brief.

Within 45 days after the certified transcript is filed, any party may file with the Regional Hearing Clerk proposed findings of fact and conclusions of law and a brief in support thereof. Briefs shall contain appropriate references to the record. A copy of these findings, conclusions, and brief shall be served upon all the other parties and the Presiding Officer. The Presiding Officer, for good cause shown, may extend the time for filing the proposed findings and conclusions and/or the brief. The Presiding Officer may allow reply briefs.

§ 124.89 Decisions.

(a) The Presiding Officer shall review and evaluate the record, including the proposed findings and conclusions, any briefs filed by the parties, and any interlocutory decisions under § 124.90 and shall issue and file his initial decision with the Regional Hearing Clerk. The Regional Hearing Clerk shall immediately serve copies of the initial decision upon all parties (or their counsel of record) and the Administrator.

(b) The initial decision of the Presiding Officer shall automatically become the final decision 30 days after its service unless within that time:

(1) A party files a petition for review by the Administrator pursuant to § 124.91; or

(2) The Administrator *sua sponte* files a notice that he or she will review the decision pursuant to § 124.91.

§ 124.90 Interlocutory appeal.

(a) Except as provided in this section, appeals to the Administrator may be taken only under § 124.91. Appeals from orders or rulings may be taken under this section only if the Presiding Officer, upon motion of a party, certifies those orders or rulings to the Administrator for appeal on the record. Requests to the Presiding Officer for certification must be filed in writing within 10 days of service of notice of the order, ruling, or decision and shall state briefly the grounds relied on.

(b) The Presiding Officer may certify an order or ruling for appeal to the Administrator if:

(1) The order or ruling involves an important question on which there is substantial ground for difference of opinion, and

(2) Either:

(i) An immediate appeal of the order or ruling will materially advance the ultimate completion of the proceeding; or

(ii) A review after the final order is issued will be inadequate or ineffective.

(c) If the Administrator decides that certification was improperly granted, he or she shall decline to hear the appeal. The Administrator shall accept or decline all interlocutory appeals within 30 days of their submission; if the Administrator takes no action within that time, the appeal shall be automatically dismissed. When the Presiding Officer declines to certify an order or ruling to the Administrator for an interlocutory appeal, it may be reviewed by the Administrator only upon appeal from the initial decision of the Presiding Officer, except when the Administrator determines, upon motion of a party and in exceptional circumstances, that to delay review would not be in the public interest. Such motion shall be made within 5 days after receipt of notification that the Presiding Officer has refused to certify an order or ruling for interlocutory appeal to the Administrator. Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made to the Presiding Officer. The Administrator may, however, allow briefs and oral argument.

(d) In exceptional circumstances, the Presiding Officer may stay the proceeding pending a decision by the Administrator upon an order or ruling certified by the Presiding Officer for an interlocutory appeal, or upon the denial of such certification by the Presiding Officer.

(e) The failure to request an interlocutory appeal shall not prevent taking exception to an order or ruling in an appeal under § 124.91.

§ 124.91 Appeal to the Administrator.

(a)(1) Within 30 days after service of an initial decision, or a denial in whole or in part of a request for an evidentiary hearing, any party or requester, as the case may be, may appeal any matter set forth in the initial decision or denial, or any adverse order or ruling to which the party objected during the hearing, by filing with the Administrator notice of appeal and petition for review. The petition shall include a statement of the supporting reasons and, when appropriate, a showing that the initial decision contains:

(i) A finding of fact or conclusion of law which is clearly erroneous, or

(ii) An exercise of discretion or policy which is important and which the Administrator should review.

(2) Within 15 days after service of a petition for review under paragraph (a)(1) of this section, any other party to the proceeding may file a responsive petition.

(3) Policy decisions made or legal conclusions drawn in the course of denying a request for an evidentiary hearing may be reviewed and changed by the Administrator in an appeal under this section.

(b) Within 30 days of an initial decision or denial of a request for an evidentiary hearing the Administrator may, *sua sponte*, review such decision. Within 7 days after the Administrator has decided under this section to review an initial decision or the denial of a request for an evidentiary hearing, notice of that decision shall be served by mail upon all affected parties and the Regional Administrator.

(c)(1) Within a reasonable time following the filing of the petition for review, the Administrator shall issue an order either granting or denying the petition for review. When the Administrator grants a petition for review or determines under paragraph (b) of this section to review a decision, the Administrator may notify the parties that only certain issues shall be briefed.

(2) Upon granting a petition for review, the Regional Hearing Clerk shall promptly forward a copy of the record to the Judicial Officer and shall retain a complete duplicate copy of the record in the Regional Office.

(d) Notwithstanding the grant of a petition for review or a determination under paragraph (b) of this section to review a decision, the Administrator may summarily affirm without opinion an initial decision or the denial of a request for an evidentiary hearing.

(e) A petition to the Administrator under paragraph (a) of this section for review of any initial decision or the denial of an evidentiary hearing is, under 5 U.S.C. § 704, a prerequisite to the seeking of judicial review of the final decision of the Agency.

(f) If a party timely files a petition for review or if the Administrator *sua sponte* orders review, then, for purposes of judicial review, final Agency action on an issue occurs as follows:

(1) If the Administrator denies review or summarily affirms without opinion as provided in § 124.91(d), then the initial decision or denial becomes the final Agency action and occurs upon the service of notice of the Administrator's action.

(2) If the Administrator issues a decision without remanding the proceeding then the final permit, redrafted as required by the Administrator's original decision, shall be reissued and served upon all parties to the appeal.

(3) If the Administrator issues a decision remanding the proceeding, then final Agency action occurs upon completion of the remanded proceeding, including any appeals to the Administrator from the results of the remanded proceeding.

(g) The petitioner may file a brief in support of the petition within 21 days after the Administrator has granted a petition for review. Any other party may file a responsive brief within 21 days of service of the petitioner's brief. The petitioner then may file a reply brief within 14 days of service of the responsive brief. Any person may file an *amicus brief* for the consideration of the Administrator within the same time periods that govern reply briefs. If the Administrator determines, *sua sponte*, to review an initial Regional Administrator's decision or the denial of a request for an evidentiary hearing, the Administrator shall notify the parties of the schedule for filing briefs.

(h) Review by the Administrator of an initial decision or the denial of an evidentiary hearing shall be limited to the issues specified under paragraph (a) of this section, except that after notice to all parties, the Administrator may raise and decide other matters which he or she considers material on the basis of the record.

Subpart F—Non-Adversary Panel Procedures

§ 124.111 Applicability.

(a) Except as set forth in this Subpart, this Subpart applies in lieu of, and to complete exclusion of, Subparts A through E in the following cases:

(1)(i) In any proceedings for the issuance of any NPDES permit which constitutes "initial licensing" under the Administrative Procedure Act, when the Regional Administrator elects to apply this Subpart and explicitly so states in the public notice of the draft permit under § 124.10 or in a supplemental notice under § 124.14. If an NPDES draft permit is processed under this Subpart, any other draft permits which have been consolidated with the NPDES draft permit under § 124.4 shall likewise be processed under this Subpart, except for PSD permits when the Regional Administrator makes a finding under § 124.4(e) that consolidation would be likely to result in missing the one year statutory deadline for issuing a final PSD permit under the CAA.

(ii) "Initial licensing" includes both the first decision on an NPDES permit applied for by a discharger that has not previously held one and the first decision on any variance requested by a discharger.

(iii) To the extent this Subpart is used to process a request for a variance under CWA section 301(h), the term "Adminstrator or a person designated by the Administrator" shall be substituted for the term "Regional Administrator".

(2) In any proceeding for which a hearing under this Subpart was granted under § 124.75 following a request for a formal hearing under § 124.74. See §§ 124.74(c)(8) and 124.75(a)(2).

(3) Whenever the Regional Administrator determines as a matter of discretion that the more formalized mechanisms of this Subpart should be used to process draft NPDES general permits (for which evidentiary hearings are unavailable under § 124.71), or draft RCRA or draft UIC permits.

(b) EPA shall not apply these procedures to a decision on a variance where Subpart E proceedings are simultaneously pending on the other conditions of the permit. See § 124.64(b).

§ 124.112 Relation to other subparts.

The following provisions of Subparts A through E apply to proceedings under this Subpart:

(a)(1) §§ 124.1 through 124.10.

(2) § 124.14 "Reopening of comment period."

(3) § 124.16 "Stays of contested permit conditions."

(4) § 124.20 "Computation of time."

(b)(1) § 124.41 "Definitions applicable to PSD permits."

(2) § 124.42 "Additional procedures for PSD permits affecting Class I Areas."

(c)(1) §§ 124.51 through 124.56.

(2) § 124.57 (c) "Public notice."

(3) §§ 124.58 through 124.66.

(d)(1) § 124.72 "Definitions," except for the definition of "Presiding Officer," see § 124.119.

(2) § 124.73 "Filing."

(3) § 124.78 *"Ex parte* communications."

(4) § 124.80 "Filing and service."

(5) § 124.85(a) (Burden of proof).

(6) § 124.86 "Motions."

(7) § 124.87 "Record of hearings."

(8) § 124.90 "Interlocutory appeal."

(e) In the case of permits to which this Subpart is made applicable after a final permit has been issued under § 124.15, either by the grant under § 124.75 of a hearing request under § 124.74, or by notice of supplemental proceedings under § 124.14, §§ 124.13 and 124.76 shall also apply.

§ 124.113 Public notice of draft permits and public comment period.

Public notice of a draft permit under this Subpart shall be given as provided in §§ 124.10 and 124.57. At the discretion of the Regional Administrator, the public comment period specified in this notice may include an opportunity for a public hearing under § 124.12.

§ 124.114 Request for hearing.

(a) By the close of the comment period under § 124.113, any person may request the Regional Administrator to hold a panel hearing on the draft permit by submitting a written request containing the following:

(1) A brief statement of the interest of the person requesting the hearing;

(2) A statement of any objections to the draft permit;

(3) A statement of the issues which such person proposes to raise for consideration at the hearing; and

(4) Statements meeting the requirements of § 124.74(c)(1)–(5).

(b) Whenever (1) a written request satisfying the requirements of paragraph (a) of this section has been received and presents genuine issues of material fact, or (2) the Regional Administrator determines *sua sponte* that a hearing under this Subpart is necessary or appropriate, the Regional Administrator shall notify each person requesting the hearing and the applicant, and shall provide public notice under § 124.57(c). If the Regional Administrator determines that a request does not meet the requirements of paragraph (a) of this section or does not present genuine issues of fact, the Regional Administrator may deny the request for the hearing and shall serve written notice of that determination on all persons requesting the hearing.

(c) The Regional Administrator may also decide before a draft permit is prepared under § 124.6 that a hearing should be held under this section. In such cases, the public notice of the draft permit shall explicitly so state and shall contain the information required by § 124.57(c). This notice may also provide for a hearing under § 124.12 before a hearing is conducted under this section.

§ 124.115 Effect of denial of or absence of request for hearing.

If no request for a hearing is made under § 124.114, or if all such request are denied under that section, the Regional Administrator shall then prepare a recommended decision under § 124.124. Any person whose hearing request has been denied may then appeal that recommended decision to the Administrator as provided in § 124.91.

§ 124.116 Notice of hearing.

(a) Upon granting a request for a hearing under § 124.114 the Regional Administrator shall promptly publish a notice of the hearing as required under § 124.57(c). The mailed notice shall include a statement which indicates whether the Presiding Officer or the Regional Administrator will issue the Recommended decision. The mailed notice shall also allow the participants at least 30 days to submit written comments as provided under § 124.118.

(b) The Regional Administrator may also give notice of a hearing under this section at the same time as notice of a draft permit under § 124.113. In that case the comment periods under §§ 124.113 and 124.118 shall be merged and held as a single public comment period.

(c) The Regional Administrator may also give notice of hearing under this section in response to a hearing request under § 124.74 as provided in § 124.75.

§ 124.117 Request to participate in hearing.

(a) Persons desiring to participate in any hearing noticed under this section, shall file a request to participate with the Regional Hearing Clerk before the deadline set forth in the notice of the grant of the hearing. Any person filing such a request becomes a party to the proceedings within the meaning of the Administrative Procedure Act. The request shall include:

(1) A brief statement of the interest of the person in the proceeding;

(2) A brief outline of the points to be addressed;

(3) An estimate of the time required; and

(4) The requirements of § 124.74(c)(1)–(5).

(5) If the request is submitted by an organization, a nonbinding list of the persons to take part in the presentation.

(b) As soon as practicable, but in no event later than 2 weeks before the scheduled date of the hearing, the Presiding Officer shall make a hearing schedule available to the public and shall mail it to each person who requested to participate in the hearing.

§ 124.118 Submission of written comments on draft permit.

(a) No later than 30 days before the scheduled start of the hearing (or such other date as may be set forth in the notice of hearing), each party shall file all of its comments on the draft permit, based on information in the administrative record and any other information which is or reasonably could have been available to that party. All comments shall include any affidavits, studies, data, tests, or other materials relied upon for making any factual statements in the comments.

(b)(1) Written comments filed under paragraph (a) of this section shall constitute the bulk of the evidence submitted at the hearing. Oral statements at the hearing should be brief and in the nature of argument. They shall be restricted either to points that could not have been made in written comments, or to emphasize points which are made in the comments, but which the party believes can more effectively be argued in the hearing context.

(2) Notwithstanding the foregoing, within two weeks prior to the deadline specified in paragraph (a) of this section for the filing of comments, any party may move to submit all or part of its comments orally at the hearing in lieu of submitting written comments and the Presiding Officer shall, within one week, grant such motion if the Presiding Officer finds that the party will be prejudiced if required to submit the comments in written form.

(c) Parties to any hearing may submit written material in response to the comments filed by other parties under paragraph (a) of this section at the time they appear at the panel stage of the hearing under § 124.120.

§ 124.119 Presiding Officer.

(a)(1)(i) Before giving notice of a hearing under this Subpart in a proceeding involving an NPDES permit, the Regional Administrator shall request that the Chief Administrative Law Judge assign an Administrative Law Judge as the Presiding Officer. The Chief Administrative Law Judge shall then make the assignment.

(ii) If all parties to such a hearing waive in writing their statutory right to have an Administrative Law Judge named as the Presiding Officer in a hearing subject to this subparagraph the Regional Administrator may name a Presiding Officer under paragraph (a)(2)(ii) of this section.

(2) Before giving notice of a hearing under this Subpart in a proceeding which does not involve an NPDES permit or a RCRA permit termination, the Regional Administrator shall either:

(i) Request that the Chief Administrative Law Judge assign an Administrative Law Judge as the Presiding Officer. The Chief Administrative Law Judge may thereupon make such an assignment if he concludes that the other duties of his office allow, or

(ii) Name a lawyer permanently or temporarily employed by the Agency and without prior connection with the proceeding to serve as Presiding Officer;

(iii) If the Chief Administrative Law Judge declines to name an Administrative Law Judge as Presiding Officer upon receiving a request under subparagraph (2)(i) of this section, the Regional Administrator shall name a Presiding Officer under paragraph (a)(2)(ii) of this section.

(b) It shall be the duty of the Presiding Officer to conduct a fair and impartial hearing. The Presiding Officer shall have the authority:

(1) Conferred by § 124.85(b)(1)–(15), § 124.83(b) and (c), and;

(2) To receive relevant evidence, provided that all comments under §§ 124.113 and 124.118, the record of the panel hearing under § 124.120, and the administrative record, as defined in § 124.9 or in § 124.18 as the case may be shall be received in evidence, and

(3) Either upon motion or *sua sponte*, to change the date of the hearing under § 124.120, or to recess such a hearing until a future date. In any such case the notice required by § 124.10 shall be given.

§ 124.120 Panel hearing.

(a) A Presiding Officer shall preside at each hearing held under this Subpart. An EPA panel shall also take part in the hearing. The panel shall consist of three or more EPA temporary or permanent employees having special expertise or responsibility in areas related to the hearing issue, at least two or whom shall not have taken part in writing the draft permit. If appropriate for the evaluation of new or different issues presented at the hearing, the panel membership, at the discretion of the Regional Administrator, may change or may include persons not employed by EPA.

(b) At the time of the hearing notice under § 124.116, the Regional Administrator shall designate the persons who shall serve as panel members for the hearing and the Regional Administrator shall file with the Regional Hearing Clerk the name and address of each person so designated. The Regional Administrator may also designate EPA employees who will provide staff support to the panel but who may or may not serve as panel members. The designated persons shall be subject to the *ex parte* rules in § 124.78. The Regional Administrator may also designate Agency trial staff as defined in § 124.78 for the hearing.

(c) At any time before the close of the hearing the Presiding Officer, after consultation with the panel, may request that any person having knowledge concerning the issues raised in the hearing and not then scheduled to participate therein appear and testify at the hearing.

(d) The panel members may question any person participating in the panel hearing. Cross-examination by persons other than panel members shall not be permitted at this stage of the proceeding except when the Presiding Officer determines, after consultation with the panel, that the cross-examination would expedite consideration of the issues. However, the parties may submit written questions to the Presiding Officer for the Presiding Officer to ask the participants, and the Presiding Officer may, after consultation with the panel, and at his or her sole discretion, ask these questions.

(e) At any time before the close of the hearing, any party may submit to the Presiding Officer written questions specifically directed to any person appearing or testifying in the hearing. The Presiding Officer, after consultation with the panel may, at his sole discretion, ask the written question so submitted.

(f) Within 10 days after the close of the hearing, any party shall submit such additional written testimony, affidavits, information, or material as they consider relevant or which the panel may request. These additional submissions shall be filed with the Regional Hearing Clerk and shall be a part of the hearing record.

§ 124.121 Opportunity for cross-examination.

(a) Any party to a panel hearing may submit a written request to cross-examine any issue of material fact. The motion shall be submitted to the Presiding Officer within 15 days after a full transcript of the panel hearing is filed with the Regional Hearing Clerk and shall specify:

(1) The disputed issue(s) of material fact. This shall include an explanation of why the questions at issue are factual rather than of an analytical or policy nature, the extent to which they are in dispute in light of the then-existing record, and the extent to which they are material to the decision on the application; and

(2) The person(s) to be cross-examined, and an estimate of the time necessary to conduct the cross-examination. This shall include a statement explaining how the cross-examination will resolve the disputed issues of material fact.

(b) After receipt of all motions for cross-examination under paragraph (a) of this section, the Presiding Officer, after consultation with the hearing panel, shall promptly issue an order either granting or denying each request. Orders granting requests for cross-examination shall be served on all parties and shall specify:

(1) The issues on which cross-examination is granted;

(2) The persons to be cross-examined on each issue;

(3) The persons allowed to conduct cross-examination;

(4) Time limits for the examination of witnesses by each cross-examiner; and

(5) The date, time, and place of the supplementary hearing at which cross-examination shall take place.

(c) In issuing this order, the Presiding Officer may determine that two or more parties have the same or similar interests and that to prevent unduly repetitious cross-examination, they should be required to choose a single representative for purposes of cross-examination. In that case, the order shall simply assign time for cross-examination without further identifying the representative. If the designated parties fail to choose a single representative, the Presiding Officer may divide the assigned time among the representatives or issue any other order which justice may require.

(d) The Presiding Officer and, to the extent possible, the members of the hearing panel shall be present at the supplementary hearing. During the course of the hearing, the Presiding Officer shall have authority to modify any order issued under paragraph (b) of this section. A record will be made under § 124.87.

(e)(1) No later than the time set for requesting cross-examination, a party may request that alternative methods of clarifying the record (such as the submission of additional written information) be used in lieu of or in addition to cross-examination. The Presiding Officer shall issue an order granting or denying this request at the time he or she issues (or would have issued) an order granting or denying a request for cross-examination, under paragraph (b) of this section. If the request for an alternative method is granted, the order shall specify the alternative and any other relevant information (such as the due date for submitting written information).

(2) In passing on any request for cross-examination submitted under paragraph (a) of this section, the Presiding Officer may, as a precondition to ruling on the merits of the request, require alternative means of clarifying the record to be used whether or not a request to do so has been made. The party requesting cross-examination shall

have one week to comment on the results of using the alternative method. After considering these comments the Presiding Officer shall issue an order granting or denying the request for cross-examination.

(f) The provisions of § 124.85(d)(2) apply to proceedings under this Subpart.

§ 124.122 Record for final permit.

The record on which the final permit shall be based in any proceeding under this Subpart consists of:

(a) The administrative record compiled under §§ 124.9 or 124.18 as the case may be;

(b) Any material submitted under § 124.78 relating to *ex parte* contacts;

(c) All notices issued under § 124.113;

(d) All requests for hearings, and rulings on those requests, received or issued under § 124.114;

(e) Any notice of hearing issued under § 24.116;

(f) Any request to participate in the hearing received under § 124.117;

(g) All comments submitted under § 124.118, any motions made under that section and the rulings on them, and any comments filed under § 124.113;

(h) The full transcript and other material received into the record of the panel hearing under § 124.120;

(i) Any motions for, or rulings on, cross-examination filed or issued under § 124.121;

(j) Any motions for, orders for, and the results of, any alternatives to cross-examination under § 124.121; and

(k) The full transcript of any cross-examination held.

§ 124.123 Filing of brief, proposed findings of fact and conclusions of law and proposed modified permit.

Unless otherwise ordered by the Presiding Officer, each party may, within 20 days after all requests for cross-examination are denied or after a transcript of the full hearing including any cross-examination becomes available, submit proposed findings of fact; conclusions regarding material issues of law, fact, or discretion; a proposed modified permit (if such person is urging that the draft or final permit be modified); and a brief in support thereof; together with references to relevant pages of transcript and to relevant exhibits. Within 10 days thereafter each party may file a reply brief concerning matters contained in opposing briefs and containing alternative findings of fact; conclusions regarding material issues of law, fact, or discretion; and a proposed modified permit where appropriate. Oral argument may be held at the discretion of the Presiding Officer on motion of any party or *sua sponte*.

§ 124.124 Recommended decision.

The person named to prepare the decision shall, as soon as practicable after the conclusion of the hearing, evaluate the record of the hearing and prepare and file a recommended decision with the Regional Hearing Clerk. That person may consult with, and receive assistance from, any member of the hearing panel in drafting the recommended decision, and may delegate the preparation of the recommended decision to the panel or to any member or members of it. This decision shall contain findings of fact, conclusions regarding all material issues of law, and a recommendation as to whether and in what respect the draft or final permit should be modified. After the recommended decision has been filed, the Regional Hearing Clerk shall serve a copy of that decision on each party and upon the Administrator.

§ 124.125 Appeal from or review of recommended decision.

(a)(1) Within 30 days after service of the recommended decision, any party may take exception to any matter set forth in that decision or to any adverse order or ruling of the Presiding Officer to which that party objected, and may appeal those exceptions to the Administrator as provided in § 124.91, except that references to "initial decision" will mean recommended decision under § 124.124.

§ 124.126 Final decision.

As soon as practicable after all appeal proceedings have been completed, the Administrator shall issue a final decision. That final decision shall include findings of fact; conclusions regarding material issue of law, fact, or discretion, as well as reasons therefore; and a modified permit to the extent appropriate. It may accept or reject all or part of the recommended decision. The Administrator may delegate some or all of the work of preparing this decision to a person or persons without substantial prior connection with the matter. The Administrator or his or her designee may consult with the Presiding Officer, members of the hearing panel, or any other EPA employee other than members of the Agency Trial Staff under § 124.78 in preparing the final decision. The Hearing Clerk shall file a copy of the decision on all parties.

§ 124.127 Final decision if there is no review.

If no party appeals a recommended decision to the Administrator, and if the Administrator does not elect to review it, the recommended decision becomes the final decision of the Agency upon the expiration of the time for filing any appeals.

§ 124.128 Delegation of authority; time limitations.

(a) The Administrator may delegate to a Judicial Officer any or all of his or her authority under this Subpart.

(b) The failure of the Administrator, Regional Administrator, or Presiding Officer to do any act within the time periods specified under this Part shall not waive or diminish any right, power, or authority of the United States Environmental Protection Agency.

(c) Upon a showing by any party that it has been prejudiced by a failure of the Administrator, Regional Administrator, or Presiding Officer to do any act within the time periods specified under this Part the Administrator, Regional Administrator, or Presiding Officer, as the case may be, may grant that party such relief of a procedural nature (including extension of any time for compliance or other action) as may be appropriate.

Appendix A to Part 124—Guide to Decisionmaking Under Part 124

This Appendix is designed to assist in reading the procedural requirements set out in Part 124. It consists of two flow charts.

Figure 1 diagrams the more conventional sequence of procedures EPA expects to follow in processing permits under this Part. It outlines how a permit will be applied for, how a draft permit will be prepared and publicly noticed for comment, and how a final permit will be issued under the procedures in Subpart A.

This permit may then be appealed to the Administrator, as specified both in Subpart A (for RCRA, UIC, or PSD permits), or Subpart E or F (for NPDES permits). The first flow chart also briefly outlines which permit decisions are eligible for which types of appeal.

Part 124 also contains special "non-adversary panel hearing" procedures based on the "initial licensing" provisions of the Administrative Procedure Act. These procedures are set forth in Subpart F. In some cases, EPA may only decide to make those procedures applicable after it has gone through the normal Subpart A procedures on a draft permit. This process is also diagrammed in Figure 1.

Figure 2 sets forth the general procedure to be followed where these Subpart F procedures have been made applicable to a permit from the beginning.

Both flow charts outline a sequence of events directed by arrows. The boxes set forth elements of the permit process; and the diamonds indicate key decisionmaking points in the permit process.

The charts are discussed in more detail below.

Figure 1—Conventional EPA Permitting Procedures

This chart outlines the procedures for issuing permits whenever EPA does not make use of the special "panel hearing" procedures in Subpart F. The major steps depicted on this chart are as follows:

1. The permit process can begin in any one of the following ways:

a. Normally, the process will begin when a person applies for a permit under §§ 122.4 and 124.3.

b. In other cases, EPA may decide to take action on its own initiative to change a permit or to issue a general permit. This leads directly to preparation of a draft permit under § 124.6.

c. In addition, the permittee or any interested person (other than for PSD permits) may request modification, revocation and reissuance or termination of a permit under §§ 122.15, 122.16 and 124.5.

Those requests can be handled in either of two ways:

i. EPA may tentatively decide to grant the request and issue a new draft permit for public comment, either with or without requiring a new application.

ii. If the request is denied, an informal appeal to the Administrator is available.

2. The next major step in the permit process is the preparation of a draft permit. As the chart indicates, preparing a draft permit also requires preparation of either a statement of basis (§ 124.7), a fact sheet (§ 124.8) or, compilation of an "administrative record" (§ 124.9), and public notice (§ 124.10).

3. The next stage is the public comment period (§ 124.11). A public hearing under § 124.12 may be requested before the close of the public comment period.

EPA has the discretion to hold a public hearing, even if there were no requests during the public comment period. If EPA decides to schedule one, the public comment period will be extended through the close of the hearing. EPA also has the discretion to conduct the public hearing under Subpart F panel procedures. (See Figure 2.)

The regulations provide that all arguments and factual materials that a person wishes EPA to consider in connection with a particular permit must be placed in the record by the close of the public comment period (§ 124.13).

4. Section 124.14 states that EPA, at any time before issuing a final permit decision may decide to either reopen or extend the comment period, prepare a new draft permit and begin the process again from that point, or for RCRA and UIC permits, or for NPDES permits that constitute "initial licensing", to begin "panel hearing" proceedings under Subpart F. These various results are shown schematically.

5. The public comment period and any public hearing will be followed by issuance of a final permit decision (§ 124.15). As the chart shows, the final permit must be accompanied by a response to comments (§ 124.17) and be based on the administrative record (§ 124.18).

6. After the final permit is issued, it may be appealed to higher agency authority. The exact form of the appeal depends on the type of permit involved.

a. RCRA, UIC or PSD permits standing alone will be appealed directly to the Administrator under § 124.19.

b. NPDES permits which do not involve "initial licensing" may be appealed in an evidentiary hearing under Subpart E. The regulations provide (§ 124.74) that if such a hearing is granted for an NPDES permit and if RCRA or UIC permits have been consolidated with that permit under § 124.4 then closely related conditions of those RCRA or UIC permits may be reexamined in an evidentiary hearing. PSD permits, however, may never be reexamined in a Subpart E hearing.

c. NPDES permits which do involve "initial licensing" may be appealed in a panel hearing under Subpart F. The regulations provide that if such a hearing is granted for an NPDES permit, consolidated RCRA, UIC, or PSD permits may also be reexamined in the same proceeding.

As discussed below, this is only one of several ways the panel hearing procedures may be used under these regulations.

7. This chart does not show EPA appeal procedures in detail. Procedures for appeal to the Administrator under § 124.19 are self-explanatory; Subpart F procedures are diagrammed in Figure 2; and Subpart E procedures are basically the same that would apply in any evidentiary hearing.

However, the chart at this stage does reflect the provisions of § 124.60(b), which allows EPA, even after a formal hearing has begun, to "recycle" a permit back to the draft permit stage at any time before that hearing has resulted in an initial decision.

Figure 2—Non-Adversary Panel Procedures

This chart outlines the procedures for processing permits under the special "panel hearing" procedures of Subpart F. These procedures were designed for making decisions that involve "initial licensing" NPDES permits. Those permits include the first decisions on an NPDES permit applied for by any discharger that has not previously held one, and the first decision on any statutory variance. In addition, these procedures will be used for any RCRA, UIC, or PSD permit which has been consolidated with such an NPDES permit, and may be used, if the Regional Administrator so chooses, for the issuance of individual RCRA or UIC permits. The steps depicted on this chart are as follows:

1. Application for a permit. These proceedings will generally begin with an application, since NPDES initial licensing always will begin with an application.

2. Preparation of a draft permit. This is identical to the similar step in Figure 1.

3. Public comment period. This again is identical to the similar step in Figure 1. The Regional Administrator has the opportunity to schedule an informal public hearing under § 124.12 during this period.

4. Requests for a panel hearing must be received by the end of the public comment period under § 124.113. See § 124.114.

If a hearing request is denied, or if no hearing requests are received, a recommended decision will be issued based on the comments received. The recommended decision may then be appealed to the Administrator. See § 124.115.

5. If a hearing is granted, notice of the hearing will be published in accordance with § 124.116 and will be followed by a second comment period during which requests to participate and the bulk of the remaining evidence for the final decision will be received (§§ 124.117 and 124.118).

The regulations also allow EPA to move directly to this stage by scheduling a hearing when the draft permit is prepared. In such cases the comment period on the draft permit under § 124.113 and the prehearing comment period under § 124.118 would occur at the same time. EPA anticipates that this will be the more frequent practice when permits are processed under panel procedures.

This is also a stage at which EPA can switch from the conventional procedures diagrammed in Figure 1 to the panel hearing procedures. As the chart indicates, EPA would do this by scheduling a panel hearing either through use of the "recycle" provision in § 124.14 or in response to a request for a formal hearing under § 124.74.

6. After the close of the comment period, a panel hearing will be held under § 124.120, followed by any cross-examination granted under § 124.121. The recommended decision will then be prepared (§ 124.124) and an opportunity for appeal provided under § 124.125. A final decision will be issued after appeal proceedings, if any, are concluded.

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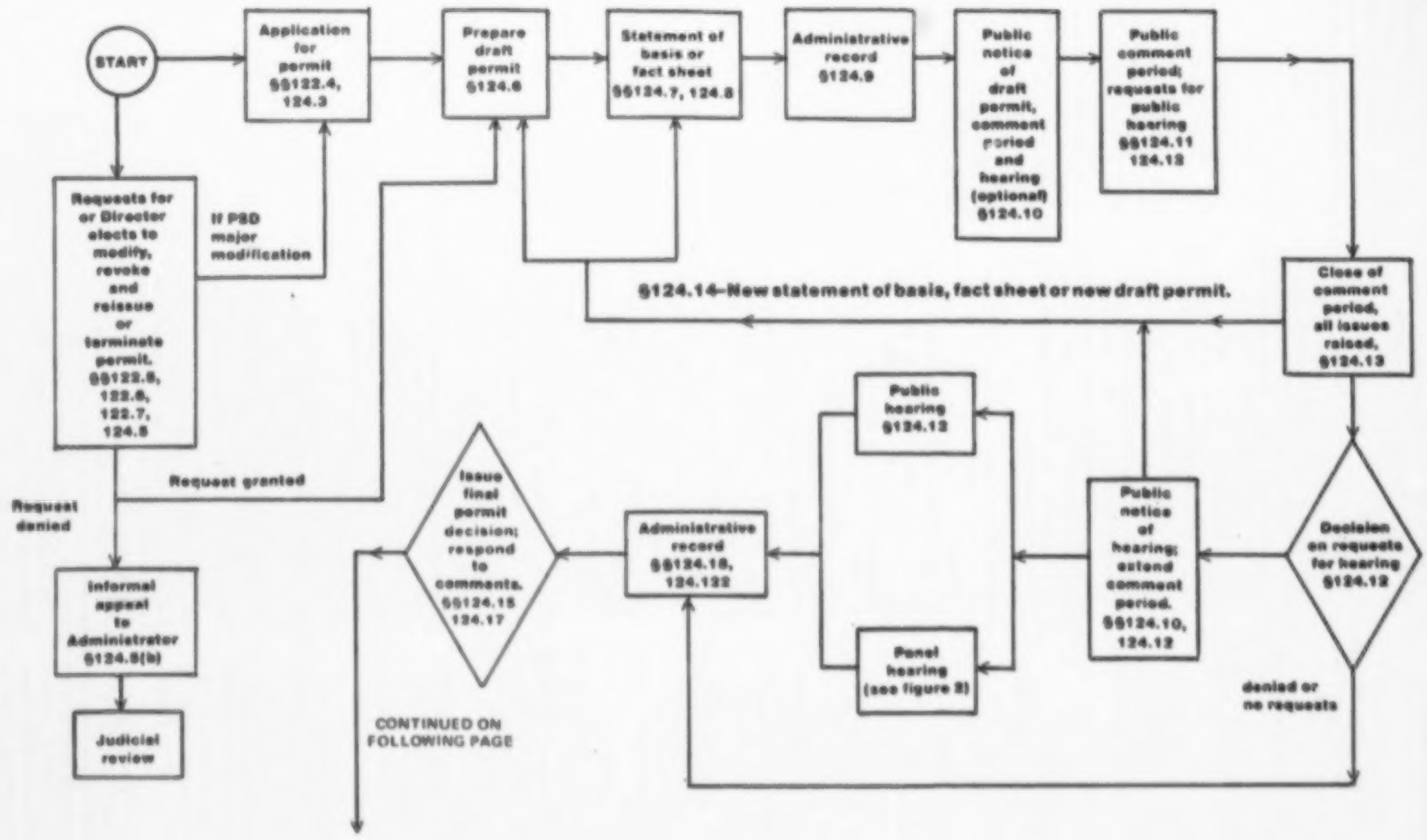
Figure 1-Conventional EPA Permitting Procedures


START
Application for permit §§122.4, 124.3
Prepare draft permit §124.6
Statement of basis or fact sheet §§124.7, 124.8
Administrative record §124.9
Public notice of draft permit, comment period and hearing (optional) §124.10
Public comment period; requests for public hearing §§124.11 124.12
Requests for or Director elects to modify, revoke and reissue or terminate permit. §§122.5, 122.6, 122.7, 124.5
If PSD major modification
§124.14–New statement of basis, fact sheet or new draft permit.
Close of comment period, all issues raised, §124.13
Request granted
Request denied
Informal appeal to Administrator §124.5(b)
Judicial review
Issue final permit decision; respond to comments. §§124.15 124.17
Administrative record §§124.18, 124.122
Public hearing §124.12
Panel hearing (see figure 2)
Public notice of hearing; extend comment period. §§124.10, 124.12
Decision on requests for hearing §124.12
denied or no requests
CONTINUED ON FOLLOWING PAGE

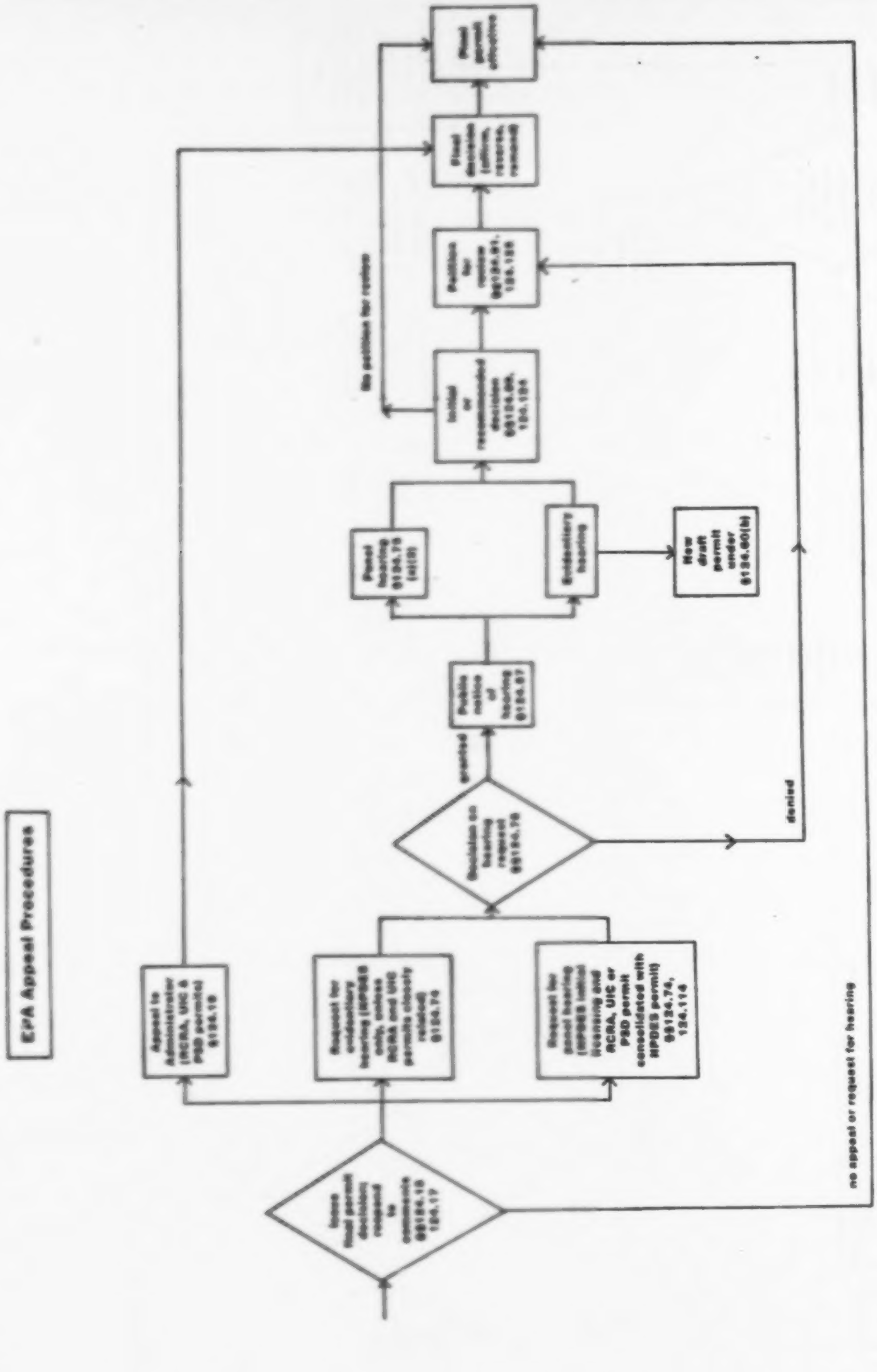
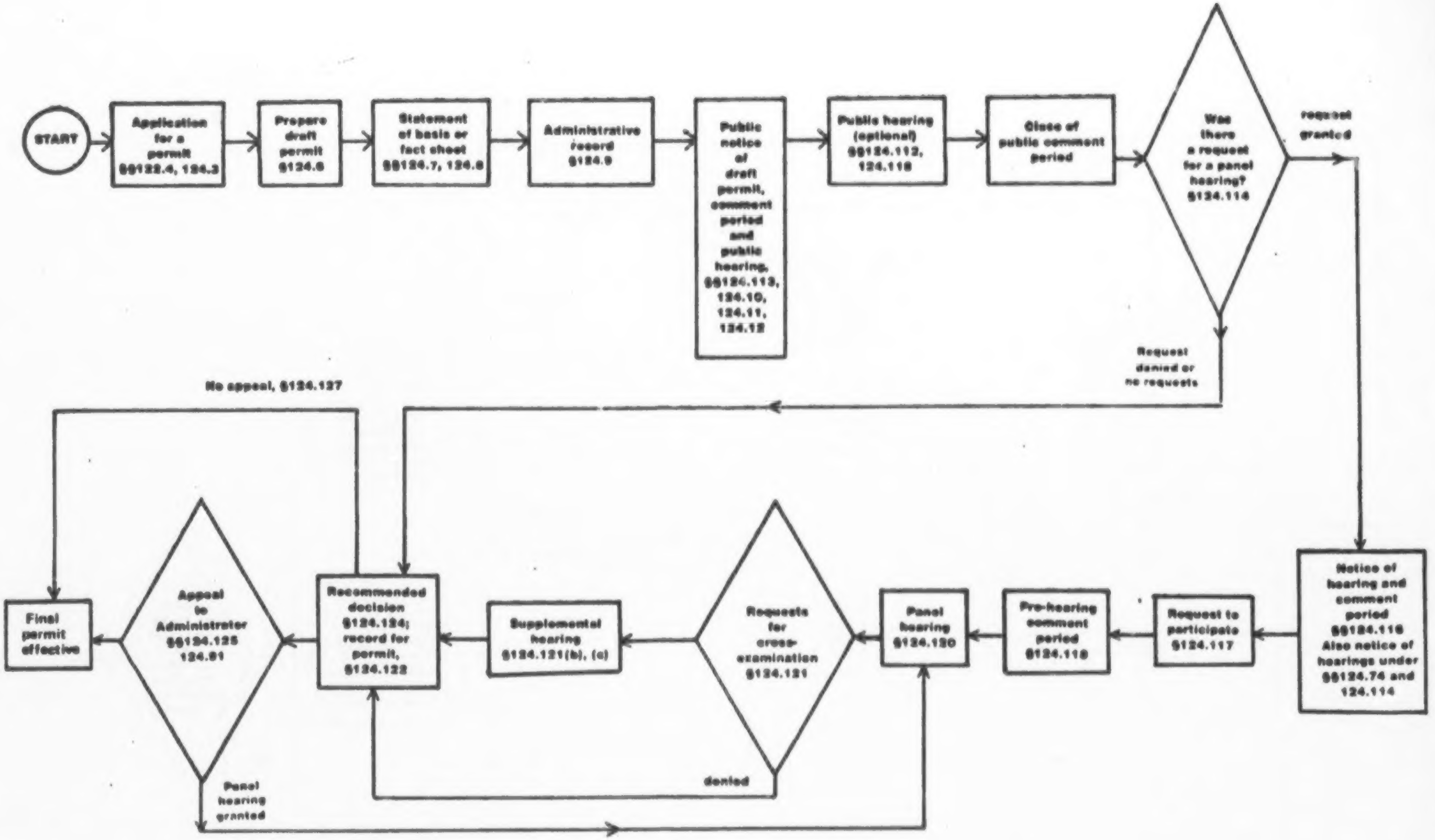

EPA Appeal Procedures
Issue final permit decision; respond to comments §§124.15, 124.17
Appeal to Administrator (RCRA, UIC & PSD permits) §124.19
Request for evidentiary hearing (NPDES only, unless RCRA and UIC permits closely related) §124.74
Request for panel hearing (NPDES initial licensing and RCRA, UIC or PSD permit consolidated with NPDES permit) §§124.74, 124.114
Decision on hearing request §§124.75
granted
denied
Public notice of hearing §124.57
Panel hearing §124.75 (a)(2)
Evidentiary hearing
New draft permit under §124.60(b)
Initial or recommended decision §§124.85, 124.124
No petition for review
Petition for review §§124.91, 124.125
Final decision (affirm, reverse, remand)
Final permit effective
no appeal or request for hearing

Figure 2-Non-Adversary Panel Procedures


START
Application for a permit §§122.4, 124.3
Prepare draft permit §124.6
Statement of basis or fact sheet §§124.7, 124.8
Administrative record §124.9
Public notice of draft permit, comment period and public hearing, §§124.113, 124.10, 124.11, 124.12
Public hearing (optional) §§124.112, 124.118
Close of public comment period
Was there a request for a panel hearing? §124.114
request granted
Request denied or no requests
Notice of hearing and comment period §§124.116 Also notice of hearings under §§124.74 and 124.114
Request to participate §124.117
Pre-hearing comment period §124.118
Panel hearing §124.120
Requests for cross-examination §124.121
denied
Supplemental hearing §124.121(b), (c)
Recommended decision §124.124; record for permit, §124.122
No appeal, §124.127
Appeal to Administrator §§124.125 124.91
Panel hearing granted
Final permit effective

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2. 40 CFR Part 125 is amended as follows:

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

A. Section 125.2 is revised to read as follows:

§ 125.2 Definitions.

For the purposes of this Part, any reference to "the Act" shall mean the Clean Water Act of 1977 (CWA). Unless otherwise noted, the definitions in Parts 122, 123 and 124 apply to this Part.

B. Section 125.3 is amended by:

1. Revising the introductory text of paragraphs (a), (a)(2), (b)(1) and (b)(2), and revising paragraph (c)(1).

2. Adding paragraphs (c)(4) and (g).

§ 125.3 Technology-based treatment requirements in permits.

(a) *General.* Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§ 122.60, 122.61 and 122.62 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines;

* * * * *

(2) For dischargers other than POTW's except as provided in § 122.67(d), effluent limitations requiring:

* * * * *

(b) *Statutory variances and extensions.* (1) The following variances from technology-based treatment requirements are authorized by the Act and may be applied for under § 122.53;

* * * * *

(2) The following extensions of deadlines for compliance with technology-based treatment requirements are authorized by the Act and may be applied for under § 122.53:

* * * * *

(c) * * *

(1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations under § 122.53 and Subpart D of this Part.

* * * * *

(4) Limitations developed under paragraph (c)(2) of this section may be expressed, where appropriate, in terms of toxicity (e.g., "The LC 50 for fat head minnow of the effluent from outfall 001 shall be greater than 25%"), provided that is shown that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the Act.

* * * * *

(g)(1) The Director may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall not be subject to modification under section 301 (c) or (g) of the Act where:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant, or

(ii)(A) The limitation reflects BAT-level control of discharges of one or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(B) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in paragraph (g)(1)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(2) The Director may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance, or

(ii)(A) The limitation reflects BAT-level control of discharges (or an appropriate level determined under section 301(c) or (g) of the Act) of one or more hazardous substance(s) which are present in the waste stream, and a specific BAT (or other appropriate) limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(B) The permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges identified in paragraph (g)(2)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(iii) Hazardous substances which are also toxic pollutants are subject to paragraph (g)(1) of this section.

(3) The Director may not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(4) Toxic pollutants identified under paragraph (g)(1) of this section remain subject to the requirements of §122.61(a)(1) (notification of increased discharges of toxic pollutants above levels reported in the application form).

C. Section 125.30 is amended by revising paragraph (b) to read as follows:

§ 125.30 Purpose and scope.

* * * * *

(b) In establishing national limits, EPA takes into account all the information it can collect, develop and solicit regarding the factors listed in sections 304(b), 304(g) and 307(b) of the Act. In some cases, however, data which could affect these national limits as they apply to a particular discharge may not be available or may not be considered during their development. As a result, it may be necessary on a case-by-case basis to adjust the national limits, and make them either more or less stringent as they apply to certain dischargers within an industrial category or subcategory. This will only be done if data specific to that discharger indicates it presents factors fundamentally different from those considered by EPA in developing the limit at issue. Any interested person believing that factors relating to a discharger's facilities, equipment, processes or other facilities related to the discharger are fundamentally different from the factors considered during development of the national limits may request a fundamentally different factors variance under § 122.53 (i)(1). In addition, such a variance may be proposed by the Director in the draft permit.

D. Section 125.72 is amended by revising paragraph (f) to read as follows:

§ 125.72 Early screening of applications for section 316(a) variances.

* * * * *

Subpart might be advisable. Accordingly, changes have been made to §§ 124.15, 124.74, 124.75, and various provisions of this Subpart to make it easier to switch a permit into this Subpart in cases where it was not placed under this Subpart from the beginning.

§ 124.111 *Applicability.*

This section has been changed to clarify that, though EPA considers variances and modifications to be eligible for "initial licensing" procedures, these procedures should not be used where they would result in duplicate hearings being held by EPA on the same permit. This could happen when a permit was being renewed and a variance application was made at the same time. The variance standing alone would be eligible for processing under Subpart F, while the other permit terms would be subject to an evidentiary hearing under Subpart E.

In such a case Subpart F could still be used if all parties agreed. However, without such agreement, the variance proceedings should be consolidated with the evidentiary hearing under Subpart E.

This principle applies to 301(h) variances as well as other types of variances.

§ *124.118 Submission of written comments on draft permit.*

One commenter argued that this provision violated the APA by failing to provide for rebuttal testimony. Rebuttal rights, however, are adequately conferred in §§ 124.120 and 124.121.

§ *124.119 Presiding officer.*

This section has been amended to make clear that the Chief Administrative Law Judge has no obligation to assign an Administrative Law Judge to preside at hearings not subject by statute to the formal hearing requirements of the Administrative Procedures Act when to do so would impair his or her ability to staff hearings that are subject to those requirements.

This section also has been amended to give the Presiding Officer greater control over the scheduling of the panel hearing. For example, if new evidence comes in, or if the evidence takes longer than expected to analyze, the Presiding Officer will be able to reschedule the start of the hearing or to recess it for a time after it has started.

§ *124.128 Final decision.*

One commenter took the title of this section as the occasion to ask when the final *permit* was issued in proceedings under this Part.

It is EPA's position that the final permit is issued at the same time as the final "decision" described in this section.

Appendix—Guide to Decisionmaking Under Part 124

During the public comment period on the proposed Consolidated Regulations, the American Petroleum Institute (API) submitted their version of a flow chart of the Part 124 Procedures for Decisionmaking. It was seven feet long. Clearly, the API flow chart exaggerated the complexity of these regulations. To give the reader a better and more accurate understanding of how Part 124 works, EPA has attached its flow chart of these procedures as an Appendix to Part 124.

PART 125—CRITERIA AND STANDARDS FOR THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

This rulemaking contains a series of revisions and technical amendments to Part 125, Criteria and Standards for the National Pollutant Discharge Elimination System. The technical amendments correct cross-references to 40 CFR Parts 122, 123 and 124, rendered incorrect, due to publication of the consolidated permit regulations where the NPDES regulations previously appeared. Two cross-references have been corrected in § 125.104(c), which is part of Subpart K, the Best Management Practices (BMP) regulation. The effective date for Subpart K has been deferred until completion of the technical guidance document for the BMP program. See 44 FR 47063 (Aug. 10, 1979) and 45 FR 17997 (March 20, 1980). In addition, §125.3 has been revised. These revisions were proposed along with the draft consolidated application forms in the June 14, 1979 **Federal Register** (44 FR 34393).

Subpart A—Criteria and Standards for Technology-Based Treatment Requirements Under Sections 301(b) and 402 of the Act

§ 125.3(c)(4)—This section allows permit limits to be written in terms of toxicity to a particular species. This regulation was proposed in Part III of the June 14, 1979 **Federal Register** (44 FR 34393). Only minor wording changes have been made from the proposal. A detailed discussion of comments received on this regulation appears elsewhere in today's **Federal Register**, in the preamble to the public notice of the consolidated application form.

§ 125.3(g)—This section authorizes the Director to use indicator pollutants to control toxic pollutants and hazardous substances by setting limits on indicators as if the indicators were toxic or hazardous. Limits on indicators (for toxic pollutants and for hazardous substances) which are conventional pollutants may be set at a level more stringent than the best conventional pollution control technology (BCT); and limits on indicators (for toxic pollutants only) which are nonconventional pollutants may be set at a level which is not subject to economic or water-quality modifications under section 301 (c) or (g) of CWA. The Director must show that the indicator provides control equivalent to a direct limitation of the toxic pollutant or hazardous substance and that a direct limitation is technically or economically infeasible.

This section, insofar as it applies to toxic pollutants, was proposed in Part III of the June 14, 1979 **Federal Register** (44 FR 34393), and a proposal to extend it to include hazardous substances was published on August 29, 1979 (44 FR 50780). A detailed discussion of the new section and the comments received on these proposals appears elsewhere in today's **Federal Register**, in the preamble to the public notice of the consolidated application form. One change has been made from the proposal: the safeguards against inappropriate use of indicators have been strengthened by adding a prohibition against setting more stringent limits on indicators where the permittee would be prevented from using a method of treatment which would assure compliance with a direct limitation on a toxic pollutant or hazardous substance.

Note.—The Environmental Protection Agency has determined that this document does not constitute a major regulation requiring preparation of an economic impact statement under Executive Order 12044. In accordance with Executive Order 12044, EPA will review the effectiveness and continued need for the provisions contained in these regulations no more than 5 years after promulgation. As part of this evaluation we will consider comments from the public, permit applicants, Regional and State permit writers, and other affected parties with regard to the financial and administrative costs incurred as a result of these regulations, and ways in which these costs can be reduced.

As explained in the portion of the preamble discussing §§ 122.36 and 122.45, EPA by this notice is inviting comment on all requirements for Class IV wells. Such comments must be received by July 15, 1980. Submit comments to: Alan Levin, Director, State Program Division (WH-550), Office of Drinking Water, Environmental